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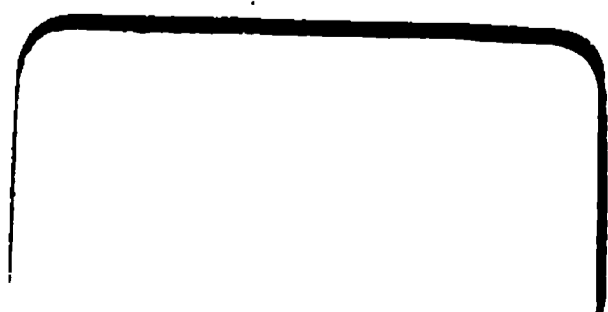
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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.

COMPILED AND ANNOTATED

BY A. C. FREEMAN,

COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENT,"
"CO-TENANCY AND PARTITION" "EXECUTIONS IN CIVIL CASES," ETC.

Vol. XVI.

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AMERICAN DECISIONS.
VOL. XVI.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

GLADWIN v. LEWIS.

[6 Conn. 49.]

THANKSGIVING DAY.—A service of civil process upon this day, is prohibited by statute, and is therefore void.

ERROR to the superior court in an action for an escape. The defendant in error, who was defendant below, pleaded in abatement that the writ was served on him on a day appointed by the governor as a day of public thanksgiving, and not on any other day. Demurrer to the plea, and judgment thereon for the defendant, to reverse which this writ of error was sued out.

Hotchkiss and Storrs, for the plaintiff in error, contended, that service of civil process on a thanksgiving day, was not declared void by the statute, and was not within the prohibition against "servile labor," and that such service being a ministerial act, might, at common law, be made on Sunday: *Mac-kalley's case*, 9 Co. 66; S. C., Cro. Jac. 280; *Swann v. Broome*, 3 Burr. 1601. And so, generally, of acts not judicial, performed on Sunday: *Rex v. Brotherton*, 1 Str. 702; *Drury v. Defontaine*, 1 Taun. 131, 135, 136.

H. L. Hosmer, for the defendant in error, contended, that the service of process on thanksgiving day, was within the prohibition of the statute against "servile labor," and was, therefore, void: 1 Com. Con. 37; 1 Pow. Con. 164, 165; 1 Swift's Dig. 213; *Mitchell v. Smith*, 4 Dall. 269; 2 Lil. Abr. 807; *Wight v. Geer*, 1 Root, 474.

BRAINARD, J. The question in this case is, whether the serv-

ice of civil process on a thanksgiving day in Connecticut is valid. We need not discuss the question, whether at the common law, the service of civil process on the Sabbath is good. Admit it. Neither is it necessary to comment on, or call in aid the several English statutes in relation to the subject. There were two made in the reign of Charles II; one, I believe, of the 24th, the other of the 27th. The subject was early taken into consideration by our legislature. Our pious ancestors thinking, perhaps, that the divine command, a command, in my view, exceedingly broad, "Six days shalt thou labor and do all thy work, but the seventh is the Sabbath of the Lord, thy God," not sufficiently explicit, not expressly prohibiting the service of writs on the Sabbath, or perhaps thinking that legislative sanction might not be amiss, enacted what, in substance, is retained in our present statute: "That if any civil process shall be issued or served between the setting of the sun, on Saturday night, and twelve o'clock of the succeeding Lord's day night, it shall be void."

This settles the question as to the service of civil process on the Sabbath in Connecticut; but it is said that in the statute entitled "Sabbath," there is a marked and material distinction between the Sabbath and days of thanksgiving; that although the service of civil process is expressly prohibited on the one, it is not on the other. It must be admitted that in Connecticut, the service of civil process is the subject of civil, not of religious regulation. The eighth section of the statute, which relates to the observance of days of thanksgiving, is: "That all persons shall abstain from every kind of servile labor and vain recreation, works of necessity and mercy excepted." The words of the statute, first section, are: "No person on the Sabbath shall do any secular business, works of necessity and mercy excepted." It is contended that although the service of civil process on the Sabbath is made void, yet the same service on days of thanksgiving is only prohibited. I am not about to enter into the discussion of the distinction between void and voidable; I will only say, that an act by law prohibited, can not be sanctioned and made valid by the payment of a fine or penalty.

It is further contended that there is a distinction between the two sections of the statute; between "secular business," and "servile labor;" that the service of a writ may be called secular business, but not servile labor. There is, indeed, a difference in expression, but, I think, not in principle. The service of a writ is labor, and generally servile. A sheriff may race his

horse after a fugitive debtor, and find the exercise servile enough; and, I think, common sense would say it was also secular. It is further said that the service of civil process on a thanksgiving day may be necessary. Without commenting on the word "necessity," as used in the several sections of the statute referred to, it is sufficient to observe that the expression "works of mercy and necessity excepted," is used in the first section of the statute in relation to the Sabbath, and also in the eighth, in relation to days of thanksgiving. But the fifth section, in relation to the service of civil process, admits of no exception of "necessities." Besides, the service of civil process on days set apart for religious observance, either by divine command or civil authority, can not be said to be a work of necessity, much less of mercy.

I would advise that the judgment of the superior court be affirmed.

HOSMER, C. J., was of the same opinion.

PETERS and BRISTOL, JJ., dissented.

Judgment affirmed.

JUDICIAL ACTS ON SUNDAY.—See *Coleman v. Henderson*, 12 Am. Dec. 290, and note.

JONES v. JONES.

[6 Conn. 111.]

DEED, DELIVERY AFTER DEATH.—A deed executed by the grantor, but retained in his possession, with directions to his wife to file it for record, after his decease, is inoperative for want of delivery in the life-time of the grantor.

SPECIFIC PERFORMANCE OF VOLUNTARY CONTRACT.—If a parent, in consideration of love and affection, make a deed to his family, which is inoperative for want of delivery in his life-time, equity will aid the grantees, and secure them the legal title.

A VOLUNTARY CONVEYANCE made with a view to a family settlement will be effectuated and recognized in equity.

BILL for the specific execution of the contracts contained in certain deeds, made by Nathaniel Jones, the plaintiffs' father, in consideration of love and affection, to the plaintiffs and to his other children and his wife. The deeds were not delivered, but the grantor retained them in his possession, and directed his wife to deposit them for record after his decease, which was done the next day after his death. when the deeds were

recorded. The superior court dismissed the bill, and the case was brought here for revision for error.

T. S. Williams and W. W. Ellsworth, for the plaintiffs in error, contended that, although the deeds were retained in the grantor's possession during his life, yet a court of chancery would give them effect: *Newl. Con.* 69; *Souverbye v. Arden*, 1 Johns. Ch. 240, 256; *Bunn v. Winthrop*, Id. 329; *Clavering v. Clavering*, 2 Vern. 473; *Johnson v. Smith*, 1 Ves. 314; *Boughton v. Boughton*, 1 Atk. 625; *Villers v. Beaumont*, 1 Vern. 100; *Naldred v. Gilham*, 1 P. Wms. 577; *McCall v. McCall*, 3 Day, 402.

N. Smith, for the defendant in error, contended that the deeds not having been delivered, could not have effect either at law or in equity.

HOMER, C. J. As the deeds were never delivered, but were retained by the grantor in his own possession, the putting them into the custody of the town clerk for record must be laid out of the question. It was no delivery of them. A warrant of attorney for this purpose would have been determined by the death of the principal, and the verbal authority can not rest on higher ground: *Bac. Abr.*, tit. Attorney, E. The case would have been different if the deeds had been delivered to the wife before the grantor's decease, for in that event the delivery of them to the use of the grantees, to take effect on the death of the grantor, would by legal operation have been a delivery to the grantees themselves: *Belden v. Carter*, 4 Day, 66 [4 Am. Dec. 185].

The question then arises whether a court of equity, there being no claim of a creditor or purchaser, will, in favor of the wife and children of the deceased, decree the specific performance of a contract, not founded on valuable consideration, which was intended as a provision by way of settlement. The law of chancery on this subject has long been established. An agreement by a parent with a child, originating from natural love and affection, and entered into for the purpose of securing a provision for the latter on account of the obligation of parents to provide for their children, will be enforced by a court of equity: *Randal v. Randal*, 2 P. Wms. 467; *Holt v. Frederick*, Id. 357; *Ex parte Barnsley*, 3 Atk. 185. On the same principle it will decree the performance of a contract in favor of a wife, though made after marriage: *Beard v. Nutthall*, 1 Vern. 427. Hence, in the case under discussion, no discrimination will be made between the equitable right of Mrs. Jones and that of

her children. Had the deeds been made on valuable consideration, there could exist no question that equity would specifically enforce the contract. Now, if a grant to a wife and children, no creditor or purchaser having any interest, is in the contemplation of a court of chancery, founded on a meritorious consideration, equally obligatory as if it were made for value received, then the result in both cases must be the same.

On a transient view of some of the determinations cited, the mind may receive an impression adverse to the claims of the plaintiff; but on more attention it will appear that even these cases, by strong implication, are in their favor. In *Naldred v. Gilham*, 1 P. Wms. 577, a voluntary settlement on a nephew, retained in possession of the aunt, the chancellor refused to establish. But this decision did not proceed on the ground that a settlement thus kept in custody by the grantor was, for this reason, invalid. From the fact that the settlement was retained in the grantor's custody, and several other circumstances, the court inferred that it was a case of fraud and imposition. The case of *Cotton v. King*, 2 P. Wms. 358, was determined on the principle that as the mother, who had made a voluntary settlement in favor of her children, remained in the visible possession of the estate and afterwards married a person who had no notice of the settlement, it was hard and inequitable to decree against the husband. The decision proceeded on the ground that the equity of the children was inferior to the husband's equity. In the case of *Ward v. Lant*, Pr. Ch. 182, a voluntary bond made by a father to his daughter, never delivered, nor intended to be delivered, was set aside. All these cases imply that if a settlement is intended to be delivered, and there is no fraud on a third person, the contract will be carried into specific execution. And in the case last cited the chancellor said he should make no difficulty if the lady, the person who made the settlement, were the survivor and the only defendant in the cause to decree against her.

The principle, that a deed of settlement retained in the possession of the grantor, although it be voluntary, if it be not tainted with fraud, nor intended not to be delivered, is always obligatory in equity, the case of *Clavering v. Clavering* most fully supports: 2 Vern. 473; S. C., 7 Bro. P. C. 410, Toml. ed. Old Sir James Clavering, having three sons, John, James, and the plaintiff, Henry, in 1663, settled six hundred pounds per annum on John, his eldest son, and five hundred pounds per annum on James, his second son; and in 1684 he likewise settled

the manor of Lamedon on trustees, in trust to pay to the plaintiff, his third son, for life, and to his daughter, Catherine, for life, one thousand pounds per annum. After this, in the year 1690, without regard to the settlement of 1684, he conveyed the manor of Lamedon to the plaintiff, for life, and made another provision for his daughter, Catherine. The settlement of 1684 was never delivered or published, but was retained by old Sir James in his own power, and after his death was found among his papers. The bill of the plaintiff was, to be relieved against the last mentioned settlement, but it was dismissed by the court. It was said by the lord keeper, that "where there hath been a covenant to stand seised to the use of a relation, although it is a voluntary settlement, yet this court, in the ancient of times, always executed such uses. In the *Lady Hudson's case*, where the father having taken displeasure at his son, made an additional jointure on his wife, but kept it in his power, and being afterwards reconciled to his son, canceled the additional jointure and deed; the wife, after his decease, found the canceled deed and recovered by virtue of it." The decree in this case was affirmed in the house of lords.

In the case of *Boughton v. Boughton*, 1 Atk. 625, it was determined by Lord Hardwicke that a voluntary deed kept by a person and never canceled will not be set aside by a subsequent will. To the same effect is the decision of the same eminent judge in *Johnson v. Smith*, 1 Ves. 314. The general principle, that a voluntary conveyance, made with a view to a family settlement, is such a conveyance as chancery will effectuate, was recognized by the court in *McCall v. McCall*, 3 Day, 402. In *Souverbye et ux. v. Arden*, 1 Johns. Ch. 240, the opinion of Chancellor Kent goes the full length of the case under discussion: "A voluntary conveyance," said the chancellor, "fairly made, is always binding in equity, upon the grantor, unless there be clear and decisive proof that he never parted, nor intended to part, with the possession of the deed; and if he retain it, there must be other circumstances, besides the mere fact of retaining it, to show that it was not intended to be absolute." In *Bunn et al. v. Winthrop et al.*, 1 Johns. Ch. 329, it was decided "that a voluntary conveyance or settlement, though retained by the grantor in his possession until his death, is good." In contravention of the determinations to which I have referred no case has been cited; nor am I aware that any exists.

The question before us is settled by all the adjudged cases, and the principles embraced by them have become firmly and indis-

putably established. A voluntary settlement of his estate on his wife and children was made by Nathaniel Jones, with the fixed intention that the deeds should remain in his custody during his life, and after his decease that they should be delivered. In point of effect the case is not distinguishable from that of a voluntary deed actually delivered, except that in the latter case the aid of chancery is not necessary to enforce the performance of the contract.

The other judges were of the same opinion.

Decree reversed.

NECESSITY OF DELIVERY OF DEED.—It is certainly settled that delivery is an indispensable requisite to the validity of a deed, whether it be a conveyance upon valuable consideration, or a mere voluntary conveyance in consideration of love and affection. Says Virgin, J., in *Brown v. Brown*, 66 Me. 316: "It is elementary law that the delivery of a deed is as indispensable as the seal or signature of the grantor. Without this act on the part of the grantor, by which he makes known his final determination to consummate the conveyance, all the preceding formalities are impotent to impart validity to it as a solemn instrument of title. No formulary of words or acts is prescribed as essential to render an instrument the deed of a person sealing it. It may be done by acts or words, or by both, by the grantor himself, or by another by the grantor's authority precedent or assent subsequent, with the intent thereby to give it effect as his deed; to the grantee personally, to another authorized by the grantee to accept it, or to a stranger with a subsequent ratification, although it do not reach the grantee until after the death of the grantor: *Shep. Touch.* 57, 58; *Porter v. Cole*, 4 Greenl. 20, 25, 26; *Chadwick v. Webber*, Id. 141, 142; *Woodman v. Coolbroth*, 7 Id. 181; *Turner v. Whidden*, 22 Me. 121; *Dwinal v. Holmes*, 33 Id. 172; *Hatch v. Bates*, 54 Id. 136, 139."

It is equally necessary that the delivery should be made in the life-time of the grantor, for there can be no delivery by a dead hand. As was said by Savage, C. J., in *Jackson v. Leek*, 12 Wend. 107, delivery after the grantor's death is no delivery. To the same effect see *Herbert v. Herbert*, 12 Am. Dec. 192; *Fay v. Richardson*, 7 Pick. 91; *Wiggins v. Lusk*, 12 Ill. 132; *Fisher v. Hall*, 41 N. Y. 423. And yet undoubtedly there may be an inchoate delivery in the grantor's life-time which will become absolute on his death: *Stone v. Duvall*, 77 Ill. 475; *Foster v. Mansfield*, 3 Met. 412. Cases of this sort present considerable difficulty. They are of two classes: 1. Those where the deed is left with a third person to be delivered to the grantee after the grantor's death; 2. Those where, as in the principal case, the grantor himself retains manual possession of the deed, intending that after his death it shall come to the grantee's hands. In both these classes of cases the decisions have been somewhat conflicting.

WHERE A DEED IS LEFT WITH A THIRD PERSON with instructions to hold it until the grantor's death and then to deliver it to the grantee, the weight of authority seems to be in favor of the doctrine that if there is no reservation by the grantor of the privilege of recalling the deed before his death, but if he delivers it to the depositary with the absolute and final determination that it shall take effect when the contingency of his death hap-

pens, it will become operative upon its delivery, after his death, to the grantee, and such delivery will relate back to the prior delivery for the purpose of passing the grantor's title: *Wheelwright v. Wheelwright*, 3 Am. Dec. 66; *Hatch v. Hatch*, 6 Id. 67; *Foster v. Mansfield*, 3 Met. 412; *Mather v. Corliss*, 103 Mass. 568; *Hathaway v. Payne*, 34 N. Y. 92; *Stephens v. Rinehart*, 72 Pa. St. 434; *Stone v. Duvall*, 77 Ill. 475; *Wallace v. Harris*, 32 Mich. 380; *Thatcher v. St. Andrew's Church*, 37 Id. 264. Mr. Chief Justice Shaw, in *Foster v. Mansfield*, 3 Met. 412, thus states the doctrine applicable to cases of this kind: "Whether when a deed is executed and not immediately delivered to the grantee, but handed to a stranger to be delivered to the grantee at a future time, it is to be considered as the deed of the grantor presently, or as an escrow, is often matter of some doubt; and it will generally depend rather on the words and purposes expressed, than upon the name which the parties give to the instrument. When the future delivery is to depend upon the payment of money, or the performance of some other condition, it will be deemed an escrow. Where it is merely to await the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently. Still it will not take effect as a deed until the second delivery; but when thus delivered it will take effect by relation from the first delivery. But the distinction is not now very material, because where the deed is delivered as an escrow, and afterwards and before the second delivery, the grantor becomes incapable of making a deed, the deed shall be considered as taking effect from the first delivery, in order to accomplish the intent of the grantor, which would otherwise be defeated by the intervening incapacity: *Wheelwright v. Wheelwright*, 2 Mass. 454 [3 Am. Dec. 66]."

In *Stone v. Duvall*, 77 Ill. 475, however, the court were of opinion that a deed left with a third person to be delivered on the grantor's death was to be regarded rather as an escrow until the second delivery, and not as the "grantor's deed presently." In that case Duvall, the grantor, executed a deed in favor of his married daughter, and handed it to a third person, with instructions to have it recorded, but not to deliver it to the grantee until the grantor's death. Afterwards the grantee died, and the grantor filed a bill against her heirs to set the deed aside. The court decided that the deed was not delivered absolutely, but as a mere escrow, but, that the grantor could not revoke it or set it aside, although he was entitled to the use of the premises until his death. Walker, J., delivering the opinion, said: "The fact that he (the custodian of the instrument) was directed to hold the deed, and not deliver it till the death of Duvall renders it absolutely certain that the grantor did not intend that the deed should take effect until that time." After some further observations on this point the learned judge proceeded: "Was this, then, a delivery as an escrow? Kent, C. J., in the case of *Jackson v. Catlin*, 2 Johns. 248, says: 'A deed is delivered as an escrow when the delivery is conditional, that is, when it is delivered to a third person to keep until something be done by the grantee; and it is of no force until the condition be fulfilled.' Sheppard, in his *Touchstone*, p. 58, gives substantially the same definition, except that he does not limit the performance of the act to the grantee, which seems to us to be the more accurate rule. Now this deed was to be delivered on the death of Duvall. That was the express condition upon which it was placed in the hands of the justice, and, according to the authority of the case of *Jackson v. Catlin*, *supra*, it was delivered as an escrow, and could not take full effect until the thing happened that was conditional to its delivery; and Duvall not having died, the deed has not yet vested the title in full, and can not until that event shall occur.

“Sheppard lays it down as the law that ‘the delivery is good, for it is said, in this case, that if either of the parties to the deed die before the conditions be performed, and the conditions be after performed, that the deed is good; for there was *traditio inchoata* in the life-time of the parties; and *postea consummata existens*, by the performance of the conditions, it taketh its effect by the first delivery, without any new or second delivery.’ But in such a case, the delivery only relates back to the first delivery so as to carry out the intention of the grantor, and to vest the title. It would not give the grantee a right to intervening rents and profits. So in this case the deed is an escrow that will not take effect until Duvall’s death, when it may be delivered to the heirs of the grantee, and it will be held to have taken effect so as to have vested such a title in the mother as to pass the fee to them. Until that time Duvall will be entitled to the use of the property as though he had a life-estate, and the children of Mrs. Stone the remainder.”

IF THE GRANTOR RESERVES THE RIGHT TO RECALL the deed, a question of much greater difficulty is presented. In such cases, as the authority to deliver the deed is revocable, it would seem upon principle to be revoked by the grantor’s death in accordance with the rule as to revocable powers generally, as laid down in *Harper v. Little*, 11 Am. Dec. 25. Where in a case of a reservation of the power to recall a deed it was actually recalled from the depository’s hands before the grantor’s death, it was held in *Maynard v. Maynard*, 6 Am. Dec. 146, that there was no effectual delivery: So, too, in *Jacobs v. Alexander*, 19 Barb. 243. There are several cases holding, however, that a delivery of a deed to a third person to be passed to the grantee on the grantor’s death, if not previously recalled, is a valid and effectual delivery where the deed is left in the depository’s hands till the contingency happens: *Belden v. Carter*, 4 Am. Dec. 185, and cases cited in the note thereto; *Shed v. Shed*, 3 N. H. 432, overruled by *Cook v. Brown*, 34 N. H. 460; *Morse v. Slason*, 13 Vt. 296. On the other hand, it is held in a number of cases that a delivery to a depository, with such a reservation of the grantor’s right to recall the deed before his death, is no delivery and is not effectual to pass the title even though the grantor should die without recalling it: *Cook v. Brown*, 34 N. H. 460; *Prutman v. Baker*, 30 Wis. 644; *Bailey v. Bailey*, 7 Jones (N. C.), 44; *Brown v. Brown*, 66 Me. 316.

WHERE THE GRANTOR HIMSELF RETAINS THE DEED, as in the principal case, intending that it shall come to the grantee’s hands after the grantor’s death, the difficulty of supporting it becomes still greater. The fact that such a deed is generally, if not always, voluntary and intended as a provision for a child or children, in the nature of a family settlement, seems, upon principle, not to be sufficient to dispense with the necessity of delivery in the grantor’s life-time. We find, therefore, that where such deeds have been upheld it has generally, if not universally, been on the ground that there was a constructive delivery, and not on the ground that delivery was unnecessary. Thus in *Souverbye v. Arden*, 1 Johns. Ch. 255, referred to in the principal case, the real ground of decision was that the circumstances showed a delivery in law, although the grantor in fact kept the deed in his own hands. It is true that the language used by Chancellor Kent in that case, as quoted by Mr. Chief Justice Hosmer, *supra*, might seem to justify an inference that he meant to hold delivery unnecessary to support such a deed in equity, but his opinion must be interpreted in the light of the facts that were before him. That he intended to be understood as holding that the evidence in that case proved a valid delivery in law, and not that delivery was not essential, is clear from what he subsequently said with reference to it in his commenta-

ries: 4 Kent Com. 456, and note, where *Souverye v. Arden* is cited as an authority upon the point as to what circumstances attending the execution of a deed will amount to a delivery, although the grantor retains it in his possession.

DELIVERY WITHOUT SURRENDERING POSSESSION OF DEED.—That there may be delivery of a deed so as to make it effectual in law, without an actual surrender of possession of the instrument, has been held in a number of cases. Thus it was decided in *Doe v. Knight*, 5 Barn. & C. 671, a leading case on this subject, that there might be a delivery by words. The grantor in that case, at the time of executing the instrument, said, in the presence of the witnesses: "I deliver this as my act and deed," and although the grantee was not present, and the grantor kept possession of the deed, Bayley, J., was of the opinion that this was a sufficient delivery. After reviewing the decisions upon this point, he said: "Upon these authorities it seems to me that where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show he did not intend it to operate immediately, that it is a valid and effectual deed, and that delivery to the party who is to take by it, or to any person for his use, is not essential." There was evidence, however, in that case, tending to show a subsequent actual delivery, and on that account the language of Bayley, J., on this point, was regarded by Dixon, C. J., in *Prutman v. Baker*, 30 Wis. 644, as mere dictum. It is nevertheless valuable as the deliberate expression of the opinion of a very learned judge, after a careful examination of the authorities. So, in *Souverye v. Arden*, 1 Johns. Ch. 240, there was evidence tending to show that the grantor, at the time of executing the deed, used formal words of delivery, and it was held that this, together with the other circumstances of the case, was sufficient to warrant a conclusion that there was an effectual delivery of the instrument, although the grantor retained possession of it, and that the burden of proof was on the grantor to show the contrary by clear and decisive evidence. So in *McLure v. Colclough*, 17 Ala. 89, a verbal delivery was held good. The ground upon which delivery is held essential to the validity of an instrument, is that it is a decisive manifestation of the intention of the maker that it shall go into immediate operation. The intention is the substantive thing. If the facts attending the execution of the instrument show that the party executing it intended it to become immediately operative and binding without any further act or ceremony on his part, there is sufficient proof of an effectual delivery, whoever may afterwards take possession of the document. Says Marston, J., in *Thatcher v. St. Andrew's Church*, 37 Mich. 264: "The act of delivery is not necessarily a transfer of the possession of the instrument to the grantee and an acceptance by him, but it is that act of the grantor, indicated either by acts, or words, or both, which shows an intention on his part to perfect the transaction by a surrender of the instrument to the grantee, or to some third person for his use and benefit." So in *Farrar v. Bridges*, 5 Humph. 411, it was held that although the grantor retained possession of a deed after its execution, if the facts nevertheless showed that it was the intention and understanding of all parties that it should go into effect without any additional formality, there was sufficient evidence of a delivery. The court said: "If no condition be annexed, if nothing remains to be performed in order to give effect to the instrument, its signing, sealing and attestation as a valid instrument between the parties, will make it complete and effectual, although the instrument may be left in the possession of the bargainer or grantor."

So it has been held that the recording of a deed by a grantor, or at his instance, is sufficient evidence of a delivery, even though the deed be afterwards retained by the grantor, because this is a strong indication of his intention that it shall become immediately operative: *Kerr v. Birnie*, 25 Ark. 225; *Robinson v. Gould*, 26 Iowa, 89; *Cecil v. Beaver*, 28 Id. 241; *Mitchell v. Ryan*, 3 Ohio St. 377; *Masterson v. Cheek*, 23 Ill. 72.

In *Scrugham v. Wood*, 15 Wend. 545, it appeared that the deed was executed by the grantor on the eve of a second marriage, as a provision for his children. It was a conveyance to trustees in trust, that the grantor should have the use and control of the premises during his life, and that then the same should go to his children. The deed was duly signed, sealed and acknowledged by the grantor and the trustees, all the parties being present, and was then retained by the grantor until his death. On ejectment by the widow to recover dower admeasured to her, it was held that there was an effectual delivery of the deed, and that the grantor's retaining possession was not inconsistent with that conclusion because he was a *cestui que trust*.

On the other hand, in *Ward v. Ward*, 2 Hayw. (N. C.) 226, a father having executed a voluntary deed in favor of his son, left it on the table all night, and on the next morning took it up and put it away. It was held that there was no delivery, it appearing to the court that the grantor did not intend the deed to become operative, but that, being about to contract a second marriage, he took this means of quieting the apprehensions of his son and to keep "peace in the family." So in *Payne v. Powell*, 5 Bush, 248, a father executed a writing purporting to make a gift of all his personal estate to his three sons, but kept it in his own possession, and it was held invalid because there was no evidence to show an actual or constructive delivery: See, also, *Stow v. Miller*, 16 Iowa, 460.

WHERE A DEED IS TO TAKE EFFECT AT THE DEATH of the grantor, as was the principal case, there must still, as already remarked, be an actual or constructive delivery in the grantor's life-time or the deed can not operate, for a will is the only instrument by which property can be disposed of by the owner after his death. The courts accordingly manifest a strong reluctance to uphold a deed made by a grantor to take effect after his death and retained in his own possession. Thus, in *Stilwell v. Hubbard*, 20 Wend. 44, a father made a deed for the purpose of giving certain land to his daughter Altie after his death, and kept the deed in his own possession until his death, and it was held on ejectment brought by the grantee that the deed was inoperative. Bronson, J., delivering the opinion, said: "In the case at bar there was no delivery to a third person. The grantor kept the deed himself. He did not intend it should be an operative conveyance so long as he lived; and if it was his settled purpose that Altie should have the land after his death, he has not taken the proper legal means for carrying that intention into effect. We cannot uphold this deed without overturning well settled principles."

So in *Patterson v. Snell*, 67 Me. 559, the court refused to uphold a deed intended by the grantor as a testamentary disposition and retained in his own possession. And, if after making the instrument, the grantor continues to use the property as his own, the case is still stronger against it. Thus, in *Shurtleff v. Francis*, 118 Mass. 154, a father executed an assignment of certain mortgages to his son, though he did not deliver it, but requested him to have it recorded as soon as he, the father, should die. The father continued, after the assignment, to treat and deal with the mortgages as his own, and on a bill in equity, filed by the son against the other heirs after the father's death,

it was held that the purpose clearly was that the transfer should not take effect until the grantor's death, and that not being according to the statute of wills, it was a nullity. If the grantor in a deed intended to take effect after his death, retains it in his possession for the avowed purpose of changing it if he should have occasion to do so, there can be no inference in favor of a binding and effectual delivery, and the deed will be inoperative: *Huey v. Huey*, 65 Mo. 689.

Where a father makes a deed in favor of his infant child, and retains possession of it until his death, that fact does not militate against the presumption of a delivery; for as the natural guardian of the child, he is the proper custodian of the document. Thus in *Newton v. Bealer*, 41 Iowa, 334, a father executed a deed to his infant son reserving to himself the use and occupancy of the premises during his life. The evidence tended to show that he intended it and regarded it as a binding conveyance, although he retained it in his own possession, and that he afterwards spoke of the property as his son's, and refused to sell timber off it, although there was some evidence to the contrary. The deed was delivered to the guardian of the son after the grantor's death, and the heirs filed a bill to set it aside, but the court below dismissed the bill and this decision was affirmed in the appellate court. Day, J., delivering the opinion of the court, said: "The only point which plaintiffs make is that there was no delivery of the deed; that Isaac Bealer died seised of the lands, and upon his death they descended to his heirs. Plaintiffs maintain that, in order to constitute a delivery of a deed, it must pass absolutely and irrevocably beyond the power and control of the grantor. Undoubtedly there are many authorities which, in more or less strong terms, settle principles under which it would be held that what occurred respecting this deed did not amount to a delivery.

"Upon the other hand there are very respectable authorities, which hold that the question of delivery does not, alone, depend upon the fact that the deed has passed beyond the control and manual power of the grantor, but that it depends very largely upon the intent of the grantor to vest an estate, and the presumed acquiescence of the grantee in the acceptance of a conveyance beneficial to him. If actual manual delivery upon the part of the grantor and acceptance by the grantee are essential to a valid conveyance, it would be impossible to execute an operative deed to an infant of very tender years. Yet the cases are numerous where deeds executed to young children, with no other proof of delivery and acceptance than that they were recorded by the grantor have been upheld. In *Foley v. Howard*, 8 Iowa, 56 (60), it is said that 'cases are not wanting to show that there may be instances where the instrument would operate as a deed, though it was not parted with by the party executing it.' In *Stow v. Miller*, 16 Iowa, 460, 463, it is said: 'If a father dies leaving among his papers a deed of land duly executed in form, to one of his children, the law will give effect to the same if there is anything indicating the intention of the intestate that it should become effective; for example, the conveying to other children an equal portion of his real estate, as was done in this case, a court of equity would be much inclined, in order to effectuate the ends of justice, to declare the deed valid, as was done in the case of *Scrugham v. Wood*, 15 Wend. 545, and this is about as far as the courts have gone on this subject. It will be observed that the death of the donor, under the circumstances stated, alters the relative condition and rights of the parties. The intervention of this contingency takes away all power to revoke the deed, or to make other disposition of the property which existed in life; and the law in such an event will, or will not imply a delivery and make effective the deed, according to the intent of the grantor, and the sur-

rounding circumstances of the case.' This we believe to be a correct statement of the law. Where one, who has the mental power to alter his intention, and the physical power to destroy a deed in his possession, dies without doing either, there is, it seems to us, but little reason for saying that his deed shall be inoperative, simply because during life he might have done that which he did not do. It is much more consonant with reason, to determine the effect of the deed by the intention existing up to the time of death, than to refuse to give it that effect because the intention might have been changed.

"Applying this doctrine to the deed in question, there can be no doubt that it should be sustained. The deceased, as he frequently declared, had made all the provisions for his other children that he intended to make. When within a very few days of his death, and evidently, as appears, contemplating approaching dissolution, he says that he has his property all fixed, and points to the chest in which the deed would be found, which, as he supposed had the effect to fix his property, so that there would be no 'fussing' about it when he was gone. He thus manifested an unequivocal intention, within a very short time of his death, to have this deed operate as a disposition of his property, and any construction of the law which ignores this intention, and defeats this purpose, prefers shadow to substance. As bearing upon this question, see *Masterson v. Cheek*, 23 Ill. 76; *Walker v. Walker*, 42 Id. 311; *Souwerbye v. Arden*, 1 Johns. Ch. 256; *Mitchell v. Ryan*, 3 Ohio St. 382; *Cecil v. Beaver*, 28 Iowa, 242.

"But the case of *Tallman v. Cooke*, 39 Iowa, 402, is decisive of this question. In that case, P. H. Tallman, on the thirteenth day of December, 1858, deeded certain lands to his son John F. Tallman, then about three and one half years old. The deed was not recorded until the twenty-third day of May, 1868. In the meantime the deed remained in the manual custody of the grantor, but he testified that he held it as the guardian of his son, and for his benefit. In 1862, the lands were sold for delinquent taxes. In 1871, John F. Tallman brought his action to redeem from this tax sale. The question was whether he became the owner of the land before the tax sale, and was entitled to the benefits of the provisions respecting redemption, applicable to minors. It was held that the deed was delivered before it was recorded, and that the title vested upon such delivery."

ENFORCING DEED AS CONTRACT TO CONVEY.—The doctrine of the principal case that where a voluntary conveyance is inoperative as a deed for want of delivery, it may nevertheless be specifically enforced in equity as a contract to convey, is in apparent conflict with the decision of the court in *Comer v. Baldwin*, 16 Minn. 172, where it was held that a deed which did not take effect for want of delivery could not be relied upon as a contract or memorandum in writing under the statute of frauds to support a specific performance, on the ground that delivery was just as essential to a contract to convey as to a conveyance, and that if the instrument was delivered at all, it was as a conveyance. It is certainly difficult to understand how an executed contract, which is inoperative because, although the grantor has done precisely what he undertook to do, that is not enough to make it effectual, can be turned into an executory contract. If such a contract is effective for any purpose, it would seem that it should be for the purpose for which the grantor made it.

ATWATER v. INHABITANTS OF WOODBRIDGE.

[6 Conn. 223.]

AN ECCLESIASTICAL SOCIETY, established by local limits before the adoption of the constitution of this state, has not been thereby, nor by subsequent statutes, divested of its local character.

STATUTE EXEMPTING FROM TAXATION lands, tenements, and other estates, extends to money at interest.

EXEMPTION FROM TAXATION, WHEN A CONTRACT.—A statute exempting from taxation the property which should be thereafter given for the support of the ministry of the gospel, is in the nature of a contract, which the state can not rescind or impair.

INDEBITATUS ASSUMPSIT for money had and received. Agreed case reserved for the advice of this court as to the proper judgment to be entered upon the following state of facts: The plaintiff was a member of the society of Bethany, an ecclesiastical society established by local limits in the town of Woodbridge. The said society had a fund established solely for the support of the gospel ministry, as early as 1809, which fund was derived from gifts and grants to the society by members and others, the interest to be appropriated annually to the purpose above indicated, and to no other; and no other use had in fact been made of any part of the principal or interest of said fund. In 1821, this fund being loaned out at interest, the town of Woodbridge, in its tax list of that year, included the Society of Bethany, and assessed it in respect of said fund two hundred and seventy dollars, the tax on which sum was twelve dollars and fifteen cents. This amount was collected under a rate-bill and warrant, by a distress levied upon the property of the plaintiff, who then brought this action to recover the same.

Sherman and Hitchcock, for the plaintiff, claimed: 1. That the said fund was exempt from taxation under the act of 1702, which was in force when the fund was established, the provisions of that statute embracing "lands, tenements, hereditaments, and other estates," and that this exemption, being in the nature of a contract with the society, could not be repealed without its consent: *Dartmouth College v. Woodward*, 4 Wheat. 518, 663; *Terrett v. Taylor*, 9 Cranch, 43; 2. That, granting the power of the legislature to repeal the exemption, this property was not subject to taxation under a proper construction of existing laws, the object of those laws being to tax income and articles of luxury indicating wealth, neither of which included this fund, and that the general tax laws do not embrace corpora-

tions, but persons only: *Hartford Fire Ins. Co. v. Hartford*, 3 Conn. 15; 3. That, if the Bethany society could be regarded as a person, still, as its members might reside anywhere in the state, it was without local limits and therefore not subject to taxation in Woodbridge, and that in any event the plaintiff's property was not liable for the tax, that liability extending only to inhabitants of the town.

N. Smith and R. I. Ingersoll, for the defendants, insisted: 1. That under the statutes of 1819 and 1820, this property, being money at interest, was subject to taxation; that corporations are persons within the meaning of the tax laws: *Rex v. Gardner*, Cowp. 79, 84; Com. Dig., tit. Chemin, B. 3; *Clinton etc. Co. v. Morse*, cited 15 Johns. 382; and that the personal estate of religious societies was not exempt; 2. That the exemption in the act of 1702, did not extend to personal property, and that if it did, the act was general and public, and not in the nature of a contract, therefore the exemption could be rescinded; 3. That the local limits of the Bethany society, as originally organized, were not destroyed by the constitution, but that it was still located in Woodbridge; 4. That the property of individual members was liable for the tax: 1 Swift's Dig. 72, 794; 9 Mass. 249.

BRAINARD, J. The great question in this case is, whether this fund was liable to taxation. There are, indeed, other subordinate questions which may deserve notice. At what time the first statute in relation to property given for religious and charitable purposes was passed, I have not been able to ascertain. It must, however, have been previous to the year 1702; for the revision of the statute in 1702, page 66, in an act, "for securing estates given to charitable uses," we find it enacted, "that all such lands, tenements, hereditaments and other estates, that either formerly have been, or hereafter shall be given and granted, either by the general assembly of this colony, or by any town, village or particular persons, for the maintenance of the ministry of the gospel in any part of this colony, or schools of learning, or for the relief of poor people, or for any other public or charitable use, shall forever remain and be continued to the use or uses to which such lands, tenements, hereditaments or other estates have been or shall be given and granted, according to the true intent and meaning of the grantors, and to no other use whatever, and also be exempted out of the general lists of estates, and free from the payment of rates." And I further

find the same section of the statute retained and continued in every subsequent edition and revision of the statutes, without the variation of a word, from that time until the revision of 1821.

It is contended that the expression "and other estate" is senseless and unmeaning; that at any rate, it can not introduce a new species of estate, any estate other and different from what had been previously mentioned, viz., real estate; that, of course, money at interest, secured by notes and bonds, for whatever purpose given, was not within the exemption; but I think there is nothing in this objection. Money is estate, and estate other than lands, etc. A different construction would do violence to reason and common sense. It is objected, on the part of the plaintiff, that even admitting that this fund was not, by the general and ancient statute before referred to, exempted, still, the town of Woodbridge had no right or authority to assess the society of Bethany; for that, by the second section of the statute relating to religious societies and congregations (revision of 1821, page 431), Bethany, as a society, had become extinct; that it had lost its identity for want of essential component parts; that nobody is obliged, for conscience's sake, to belong to it; therefore, nobody does belong to it. The statute including the section last referred to was passed previous to the year 1820. The section is: "Whenever any person shall desire to join any religious society or congregation, which has been or shall be incorporated by law, or has been or shall be formed by voluntary association, he may lodge with the clerk of the same, or if there be no clerk, with any other officer thereof, a written declaration, subscribed by himself, expressing his desire and intention of becoming a member of such society or congregation, and, thereupon, he shall become a member thereof, entitled to all the privileges, and liable to all the duties of a member, unless a majority shall, at their next lawful meeting, manifest their dissent thereto."

The case states that Bethany was a legally organized and constituted ecclesiastical society by local limits; and the first section of the statute last referred to contemplates and admits the existence of such societies, and moreover provides for their continuance. To be sure, this society, like other corporations or bodies, both natural and political, is, as to its members and component parts, constantly liable to changes. It is true that by the section last referred to in relation to the liberty of conscience, a man may very easily cease to be a member of any

particular ecclesiastical society. A man may be born and educated a Presbyterian, an Episcopalian, or of any other denomination of Christians, and for conscience's sake disclaim the connection. But such a member, when he lodges his conscientious certificate, does not carry with him the pillars of the society where he was born and educated; nor of the church where he was baptized. There is therefore, in my view, no substance in this objection. Bethany was a society or corporation capable of receiving and holding property, and liable to be assessed for it unless exempted.

Another point is made, on the part of the plaintiff, that his property as an individual was not liable to be taken, by distress, for the debt or duty of the society of which he was a member. Were this the decisive point in the case, it might be of more serious consideration. If we admit that the society of Bethany was a legally organized society, capable of taking and holding property liable to taxation, and this assessment was properly laid on that society; I do not see but that, according to the principles and practice of cases analogous to this, the distress may be warranted. This practice, with regard to towns, has obtained in New England, so far as I have been able to investigate the subject, from an early period from its first settlement: a practice brought by our forefathers from England, which had there obtained in corporations similar to the towns incorporated in New England. And if this be correct as to towns, I see no reason why the same principles and practice should not be applicable to societies. They are communities for different purposes, but essentially of the same character. In either case the individual affected has his remedy; the operation of which, if well applied, will cure the evil. The town or society will be brought to a sense of duty, and make provision for payment and indemnity.

But the great question in the case is still to be answered. I have already said that money, notes and bonds drawing interest, are estate—estate other and different from lands, tenements and hereditaments; and I think there can be no question but that under the protection of the section or paragraph in the revision of 1702, and which was continued without the least alteration until long after the establishment of Bethany fund, that fund was exempt from taxation. The next and remaining questions are, whether this right of exemption, given to the donees and grantees of property under that section, could be taken from

them; and if it could, whether it has ever been effected by any act of legislation?

The statute, entitled "An act for the assessment of taxes," provides "that all moneys at interest, secured by notes or bonds of responsible persons, or by mortgages on real estate, shall be set in the list at six per cent." The same statute, in the same section, says, that all lands shall be set in the list at three per cent. of their value, and all silver-plate at six per cent. of its value. These expressions must all have a rational construction, according to the subjects to which they relate. Who would say that in the expression "silver plate," as there used, was meant to be included silver plate dedicated to the service of the communion? That by the expression "all lands," as there used, are included lands appropriated to the interment of the dead? And who can say that under the expression "all moneys at interest," are necessarily included moneys given under sanction and protection of an ancient law, a law which exempted it from taxation, a law unrepealed, unless by mere implication? I think the fair reading is, all moneys at interest shall be set in the list, etc., except such moneys as by law are exempted. In no act of the legislature do I find the statute of 1702 repealed; certainly not expressly, and I think not by any fair implication. The statute of 1821 differs in point of expression from the statute in the revision of 1702. It is, "all lands, covenants or other estates, that have been, or shall be, given or granted by the general assembly, or any town, or particular person, for the maintenance of the ministry of the gospel, or schools of learning, or for the relief of the poor, or for any other public and charitable use, shall forever remain and be continued to the uses to which they have been, or shall be, given or granted, according to the true intent and meaning of the grantor, and to no other use whatever:" Stat. 301, tit. 56, c. 1, sec. 3.

It is true that under this statute there is no exemption of property of the description under consideration from taxation. But here I would apply the same principle that I have before stated, that this must be taken with the rational proviso that whatever privileges and exemptions have been, by former laws, granted and annexed to property of this description, shall still remain. I can not, for a moment, believe that the legislature ever intended to interfere with the rights given and acquired under the first statute. But if they did, I will, with deference, but with boldness, say they had no constitutional power to affect it. It appears to me that property given under the statute, so long as

it is applied to the uses designated, must forever retain the rights and privileges attached to it at the time of the grant. That the government made a contract with all such persons as might be disposed to give their property to these religious purposes and charitable uses, that it should forever be exempted from taxation. That a right in the grantees, donees, devisees or legatees, became vested, which no subsequent legislature could divest. They had a right at all times to prescribe the terms on which any future grants or donations should be made or given; but I think they have no constitutional right or power, either directly or indirectly, to impair former grants or to lessen their natural productiveness. Taxation may be a worm at the root, which, in its consequences, may destroy both root and branch.

I would, therefore, advise that judgment be for the plaintiff to recover the amount of money paid, with interest and costs.

The other judges were of the same opinion, except DAGGETT, J., who gave no opinion, having been of counsel in the case.

Judgment for plaintiffs.

EXEMPTION FROM TAXATION AS CONTRACT.—It was long held in Connecticut on the authority of this case that the provisions of the act of 1702 exempting from taxation property given or granted for public charitable, religious or pious uses, were, so far as related to gifts made or funds raised for such purposes, while that act was in force, in the nature of a contract, which could not be repealed by the legislature: *Osborne v. Humphrey*, 7 Conn. 339; *Parker v. Redfield*, 10 Id. 495; *Landon v. Litchfield*, 11 Id. 260. But where the grant or lease under which the property was held itself contemplated the payment of taxes by the grantee, it was decided that such property was subject to taxation at the will of the legislature: *Hart v. Town of Cornwall*, 14 Conn. 228. So in *Town of New Haven v. Sheffield*, 30 Conn. 172, it was decided that after the property granted for such uses was sold the exemption applied to the fund raised therefrom, and not to the property itself. In *East Hartford v. Hartford Bridge Co.*, 17 Conn. 93, and *Seymour v. Hartford*, 21 Id. 486, the principal case was relied on as authority for the general proposition that the legislature may by an act in the nature of a contract relinquish its right to tax a particular species of property, and that relinquishment will be binding on succeeding legislatures.

This whole subject was, however, re-examined by the supreme court in *Lord v. Town of Litchfield*, 36 Conn. 130, and it was determined that the exemption in the act of 1702 was not an irrepealable contract. Carpenter, J., delivering the opinion, decided: 1. That if the contract was between the grantor and the legislature, where property was given for such a purpose, the grantee, was not privy thereto and could not enforce it; 2. That if the contract was with the grantee there was no consideration for it; 3. That the exemption was a mere gratuity; 4. That the exemption must apply to the proceeds after a sale, and that if there were no proceeds, as where the property was disposed of in payment of an antecedent debt, there would be no exemption; and that the legislature could not be presumed to have intended a

binding and perpetual exemption thus to depend on the act of the grantee; 5. That by the terms of the act of 1702 the exemption applied to property given or granted for the purposes named, whether the gift or grant was made before or after the passage of the act, and that as there certainly could be no perpetually binding contract with reference to property previously given or granted, the legislature could not have intended the act as a contract at all. The learned judge then proceeded to say:

“There is another feature of this statute which deserves particular attention. It expressly applies to all property which had been, or which should thereafter be, granted by the general assembly of this state. Now, upon the supposition that the contract contended for was with the grantors, and that is the ground of the decisions of this court in *Atwater v. Woodbridge*, 6 Conn. 223, and *Osborne v. Humphrey*, 7 Id. 335, cases upon which *Landon v. Litchfield* rests, we are driven to the necessity of holding that the state entered into a contract with itself, and pledged its faith to itself, that such property should never be taxed. If the statute applied only to cases of this description, no one would contend that it was a contract which tied up the hands of succeeding legislatures. On the whole, we think it reasonable, and the only reasonable course, that the statute, in relation to all the property named in it, should receive the same construction; that the legislature intended to place all such property upon the same footing. That can only be done by rejecting the idea of a contract. We will close this branch of the case by a reference to the language of Judge Bissell in *Parker v. Redfield*, 10 Conn. 495. In speaking upon this question, and in relation to the cases of *Atwater v. Woodbridge* and *Osborne v. Humphrey*, he says: ‘Were this now an open question, we might well doubt whether it be in the power of one legislature, by a general law, to tie up the hands of succeeding legislatures; and whether a statute exempting a particular species of property from taxation, is in the nature of a contract of perpetual obligation.’ It is true he yielded to the authority of those cases; but as that authority is shaken somewhat by *Brainard v. Colchester*, 31 Conn. 407, we have felt at liberty to examine the question upon principle, and upon such examination being satisfied that those decisions are not founded in correct principles, we feel constrained to disregard their authority and to declare the law to be otherwise.” It is proper to observe, however, that this decision was not necessary to the determination of the case before the court; for, as was shown in another part of the opinion, even regarding the exemption as a binding contract, it must have been considered forfeited as to the particular property in question, by the fact that said property had been disposed of by a long lease, which was tantamount to a sale, and had passed into the hands of strangers, so that it was no longer devoted to the uses for which it was granted.

In the subsequent case of *First Ecclesiastical Society of Hartford v. Hartford*, 38 Conn. 286, the decision in *Lord v. Town of Litchfield*, 36 Id. 130, was declared to have settled the doctrine that the exemption in the act of 1702 was not an irrepealable contract; but, at the same time, the position taken in the principal case that this exemption was not in fact repealed by the act of 1821, with respect to property previously granted, which continued to be devoted to the purposes for which it was granted, was recognized as sound. Seymour, J., after reviewing the Connecticut cases on this point, stated the result to be: “The law, then, as settled by authority on this vexed question is now as follows: 1. It is not doubted that by the revision of 1821 all property thereafter conveyed to public uses is subjected to taxation; 2. As to property conveyed to public uses before 1821, it may be taxed if the legislature chooses to subject it to taxation; but such property is left by the

acts of 1821 under the protection of the statute of 1702 so long as it is faithfully appropriated to its designated use."

THE PRINCIPAL CASE IS CITED, also, in Connecticut, on the following points: That the property of an individual member of a *quasi* corporation may be levied on to pay its debts; *McLoud v. Selby*, 10 Conn. 395; *Wood v. Hartford Fire Ins. Co.*, 13 Id. 211; *Beardsley v. Smith*, 16 Id. 379; *Second Ecclesiastical Society of Portland v. First Ecclesiastical Society of Portland*, 23 Id. 279; that a tax voted by a town, or other *quasi* corporation, to "defray expenses" of the corporation, is sufficiently definite: *West School District v. Merrills*, 12 Conn. 440; that an action lies to recover back money paid on an illegal tax: *Bailey v. Town of Goshen*, 32 Conn. 548; and that the court may disregard an unconstitutional act of the legislature: *Trustees of Bishop's Fund v. Rider*, 13 Conn. 93.

AVERY v. CHAPPEL.

[6 Conn. 270.]

PAROL EVIDENCE IS NOT admissible to show the intention of a testator in making his will, and thereby to obtain a construction of the will not warranted by its express terms.

MISTAKES IN WILLS.—Equity can not, on parol proofs, relieve against a mistake in a will, by reforming the will so as to conform it to the instructions alleged to have been given by the testator to the scrivener.

A WILL CAN NOT BE ENLARGED OR VARIED by parol evidence, except to explain a latent ambiguity arising *dehors* the will, or to rebut a resulting trust.

BILL for relief against a judgment, whereby Charles W. Chappel had recovered possession of the real estate of his father, Gilbert Chappel, lately deceased, under his will. The plaintiffs, Jabez Avery and Rebecca, his wife, who was the widow of Gilbert Chappel, claimed that the said Gilbert intended by his will to give his real estate to his wife until his children should arrive at full age, and that the will was not so drawn by the mistake of the scrivener, and they offered parol evidence of the testator's declarations before, at, and after the making of his will, in the presence of the scrivener and others, to prove such intention. They also claimed that it was the testator's expressed desire that his widow should marry some one capable of attending to and superintending the cultivation of his real estate, and that the widow believed that she was complying with his wishes in intermarrying with the plaintiff Avery. The defendants relied upon the terms of the will, the material clauses of which were: "I do hereby give and allow unto my beloved wife, Rebecca, the use and improvement of one third part of my home farm, during her widowhood; also, the use of one third part of the buildings standing thereon."

"I do also give to my beloved wife the use and improvement of all my estate, both real and personal, until my children become of lawful age, to be improved according to the rules of good husbandry, excepting the interest which may arise on my notes and mortgages." "I give and bequeath unto my only son, Charles W. Chappel, and to his heirs, two thirds of my home farm and two thirds of the buildings standing thereon, excepting his sister's right in the dwelling-house, etc. And it is my will that Charles W. Chappel should have the whole of my landed property, after the marriage or decease of his honored mother." The testator further gave sundry chattels to his son and daughter respectively, and a legacy to the latter and a right in his dwelling-house as long as she should remain unmarried. The judge at the trial below admitted the parol evidence offered by the plaintiffs to prove the intentions of the testator against the defendant's objection; and on account of this decision the defendants now moved for a new trial.

H. Strong, for the motion, to show that courts of equity will never admit extrinsic evidence to prove that a testator's intent was different from that expressed in his will, wherever the will can be executed as it stands, and that the only cases where such evidence is admissible, are those of latent ambiguity, fraud, mistaken description, etc., cited *Hampshire v. Peirce*, 2 Ves. 216; *Elliot v. Elliot*, 2 Ch. Cas. 231; *Towers v. Moor*, 2 Vern. 98; *Lord Falkland v. Bertie*, Id. 333; *Bertie v. Lord Falkland*, 3 Ch. Cas. 129; *Bennet v. Davis*, 2 P. Wms. 316; *Brown v. Selwin*, Cas. t. Talb. 240; *Lady Osborne v. Villiers*, cited 2 Bac. Abr. 71 (Gwil. ed.); *Gale v. Crofts*, cited 2 Eq. Cas. Ab. 415, pl. 5; *Hunt v. Hort*, 3 Bro. Ch. 311; *Mellish v. Mellish*, 4 Ves. 45; *Phillips v. Chamberlaine*, Id. 57; *Cambridge v. Rous*, 8 Id. 22; *Shergold v. Boone*, 13 Id. 376; *Herbert v. Reid*, 16 Id. 481; *Andrews v. Dobson*, 1 Cox Ch. 425; *Doyle v. Blake*, 2 Sch. & Lef. 240; *Murray v. Jones*, 2 Ves. & B. 318; *Mann v. Mann*, 1 Johns. Ch. 231 [7 Am. Dec. 416]; *Pow. Dev.* 478, 521; 1 Phil. Ev. 468, 469. He insisted also that the court of probate had exclusive jurisdiction to determine whether this instrument contained the will of the deceased.

Goddard and G. C. Goddard, contra, contended that parol evidence is admissible to correct a mistake in a deed or written contract: *Chapman v. Allen*, Kirby, 399 [1 Am. Dec. 24]; *Matson v. Parkhurst*, 1 Root, 404; *Cook v. Preston*, 2 Id. 78; *Washburn v. Merrills*, 1 Day, 139 [2 Am. Dec. 59]; *Peter v. Goodrich*,

3 Conn. 146, 150; *Gillespie v. Moon*, 2 Johns. Ch. 585 [7 Am. Dec. 559]; *Drum v. Simpson*, 6 Binn. 478 [6 Am. Dec. 499]; *Graves v. Boston Marine Ins. Co.*, 2 Cranch, 419, 444; and also to correct a mistake in a will by showing the intention of the testator: *Gainsborough v. Gainsborough*, 2 Vern. 252; *Thomas v. Thomas*, 6 T. R. 671; *Masters v. Masters*, 1 P. Wms. 421; *Harris v. Bishop of Lincoln*, 2 Id. 135; *Duke of Rutland v. Duchess of Rutland*, Id. 209; *Hodgson v. Hodgson*, 2 Vern. 593; *Pultney v. Earl of Darlington*, 1 Bro. Ch. 223; *Druce v. Denison*, 6 Ves. 385; 2 Fonb. Eq. 477, 478; Sugd. 111.

DAGGETT, J. The object of the bill is to obtain relief against a judgment of the superior court, rendered in favor of O. W. Chappel, one of the defendants, by which he recovered the possession of the real estate of his father, Gilbert Chappel, lately deceased, under his will, duly proved and approved by the court of probate (see. 6 Conn. 31). The plaintiffs, Rebecca Chappel, having, since the decease of Gilbert Chappel, intermarried with Jabez Avery, proceeded on the ground that the testator intended to give, by his will, the land in question to his wife, Rebecca, till Charles, his son, should arrive at full age, and that he should then take it by way of remainder. The court decided, that her interest in it ceased, on her intermarriage with her present husband.

The bill alleges that, before the making of the will, at the time of its execution, and afterwards, in repeated conversations with her, and others, the testator declared such to be his intention; and further, that he instructed the scrivener so to express it, and that by mistake the will was so drawn as to give her the estate only during her widowhood. The proof offered by the plaintiffs was parol evidence only. Upon these facts, with our statute of wills and the solemnities required by it, in view, it is certainly difficult to interpose for the relief of the plaintiffs. The court is asked to take from the devisee, the principal object of the testator's bounty, the possession of this estate for a long period, in opposition to the true construction of the will by parol proof of the declarations of the deceased, that he intended to give it to his wife, in other words to make a will for him, when he sleeps in his grave. Strong reasons should be urged in support of a claim so novel and so forbidding. It is not suggested by the counsel for the plaintiffs, that parol evidence of declarations of the testator made either before or after the execution of the will, to explain or vary it, can be received.

Such a suggestion would be too bold. It cannot be supported by a shadow of authority.

It is, however, urged that parol evidence ought to be admitted to correct mistakes in deeds and other writings; and that a court of equity will relieve against such mistakes, as well as against fraud. To prove this position several authorities are cited. There is no doubt that a mistake in a deed or contract may be shown by parol proof; and that either by a party seeking relief against it in his bill, or setting it up by way of defense to rebut an equity. This is deemed the settled doctrine in this country and in England. Many of the cases are brought together in a lucid manner by Chancellor Kent in a case cited by the plaintiffs, viz.: *Gillespie et ux. v. Moon*, 2 Johns. Ch. 585 [7 Am. Dec. 550]. In Connecticut, the cases cited from Kirby, 400; 1 Root, 404; 2 Id. 78; 3 Conn. 150, and 1 Day, 139 [2 Am. Dec. 59], are directly to that point. In the case last cited: *Washburn v. Merrills*, the principle was much discussed, and thoroughly established. The court, however, in such cases, will not interfere except upon the most strong and satisfactory proof.

But the plaintiffs in this bill are obliged to go much further to obtain the relief sought. They must show that the testator's intention may be proved to be different from what appears on the face of the will, by parol evidence, that he directed the scrivener so to write it, that the wife should enjoy the estate till the son should be twenty-one years of age. It is not believed that any principle or precedent can be found to establish such a doctrine. The principle of the common law is that parol evidence shall not be received to explain, control or vary a written instrument, and that nothing was intended at its execution, but what is expressed. *Expressio unius est exclusio alterius*. In relation to wills, Chancellor Kent, in *Mann et al. v. Executors of Mann et al.*, 1 Johns. Ch. 231, 234, examined the subject with an industry and learning scarcely equaled, except by himself in other cases, and declares the result to be: "That from *Cheyney's case*, 5 Co. 68, down to this day, it has been a well settled rule that parol evidence cannot be admitted to supply or contradict, enlarge or vary the words of a will, nor to explain the intention of the testator, except in two specified cases: 1. Where there is a latent ambiguity, arising *dehors* the will, as to the person or subject meant to be described; and, 2. To rebut a resulting trust." The cases referred to fully support his positions.

If it be said that the plaintiffs rely chiefly on the allegation of the instruction giving to the scrivener and the mistake, it

may be asked, if a will is to be established, by showing an intent to make one? In the present case, has the testator devised to his wife the land in question, not during her widowhood, as the will proved by the court of probate declares, but till Charles, the son, arrived at full age, because a witness testifies that he so directed the scrivener, though words of a totally different meaning were employed. Then, as Lord Talbot observed (3 P. Wms. 354), "the witnesses and not the testator would make the will;" or, as Sir Matthew Hale said, 1 Mod. 310, "How can there be any certainty? A will may be anything, everything, nothing. The statute appointed the will to be in writing to make a certainty, and shall we admit collateral averments and proofs, and make it entirely uncertain?" Again, in *Towers v. Moor*, 2 Vern. 98, it was attempted to have the will explained by proof of what the testator declared, and the instruction he gave. The court said, "that devises of land must be in writing, and they would not go against the act of parliament."

In *Purse v. Snaplin*, 1 Atk. 415, Lord Hardwicke says: "Mistakes are not to be supposed, if any construction that is agreeable to reason can be found out:" 2 Fonb. 477. "The will that must pass the land must be in writing, and must be decided by what is contained in it." It was decided by the highest court in South Carolina, after much discussion and deliberation, that parol evidence, even of the person who drew the will, and who was of unimpeachable character, when offered to support the allegation of a mistake in the will, and to prove that the testator intended to dispose of the property in a manner not apparent on the face of the will, was not admissible. *Rothmahler v. Myers et al.*, 4 Desau. 215 [6 Am. Dec. 613], where there is a complete and plain will in writing, it can not be altered or influenced by parol evidence as to the intention: 2 P. Wms. 421. Evidence as to matters *dehors* the will, to show the mistake, is insufficient: 2 Atk. 373. Even the instructions for the will are inadmissible to show a mistake: 2 Ves. & B. 318; 1 Mad. Ch. 81. The doctrine above stated is fully confirmed by cases cited in 3 Starkie on Ev., 1010, 1017, 1018, 1027, as well as by the opinion of the learned commentator. In a very late decision of the court of common pleas in England, 4 Dow. 65, the same principle is strongly enforced.

I am then well satisfied that the parol evidence offered ought not to have been admitted; and that the plaintiffs can take nothing by their bill, and would so advise the superior court. The defendants have also urged that the jurisdiction of this

cause, if relief could be had anywhere, belongs to the court of probate; that to that court belongs the power of deciding on wills, subject to revision in the superior court; and that it would create an anomaly in our law that a will, having been established in a court of probate, should be annulled, or its provisions essentially varied, in the superior court, except by appeal, as the law provides. This objection, as it strikes my mind, is of weight, but I have not examined it with a view to express an opinion upon it, because a decision upon the other point decides the case.

The other judges were of the same opinion, except PETERS, J., who did not hear the argument, and therefore gave no opinion.

New trial to be granted.

EXTRINSIC EVIDENCE TO EXPLAIN WILL.—See on this point: *Jackson v. Sill*, 6 Am. Dec. 363; *Rothmahler v. Myers*, Id. 613; *Breckenridge v. Duncan*, 12 Id. 359; *Comstock v. Hadlyme*, 8 Conn. 266, where the principal case is cited. It is referred to also in *Abbe v. Goodwin*, 7 Conn. 384, as an authority upon the question of the admissibility of parol evidence generally to correct mistakes in written instruments.

GREENE v. DENNIS.

[6 Conn. 293.]

DEVISES VOID IN LAW because made to a corporation not capable of holding lands, or because of a fatal misnomer, have been sustained and aided in equity.

DEVISE TO THE YEARLY MEETING OF QUAKERS, and to their successors is void, because the association is not a corporation, and the members are not so designated as to take as individuals.

UNCERTAINTY.—A grant to the inhabitants of Dale, or to the commoners of a certain waste, or to the people of a county, is void.

PRESUMPTION OF INCORPORATION.—A grant or charter may be presumed from long continued exercise of corporate powers; but to give rise to this presumption the acts done must bear the impress of corporate acts; must be such as corporations are competent and individuals incompetent to perform.

THAT THE YEARLY MEETING OF QUAKERS kept records, had a clerk and treasurer, received contributions, exercised general supervision over the spiritual concerns of the Quakers, celebrated marriages, and admitted and discarded members, does not prove that it was a corporation.

CORPORATIONS AS TRUSTEES.—Corporations, unless specially authorized, can not be seised of lands to the use of another.

IN CASE OF A LAPSED DEVISE, the lands do not vest in the residuary devisee, but descend to the heir.

EJECTMENT for a certain farm. The plaintiffs claimed title as heirs at law of Sylvester Wickes, and the defendant claimed as lessee of the yearly meeting of the people called Quakers, devisees, and of Rowland Greene, residuary devisee, under the will of the said Wickes. The will was offered in evidence, and the clauses under which the defendant claimed were as follows: "I give the yearly meeting of the people called Quakers, of New England, my farm in Pomfret, that I bought of Clark and Nightingale, the net income of which to be appropriated in aid of the charitable fund of the boarding school established by Friends in Providence; to them the said people called Quakers, and their successors in the same faith forever." Then, after other devises and bequests, the residue was disposed of as follows: "Also, I give to my said nephew, Rowland Greene, all the rest and residue of my estate, of what kind or nature it may be, or wherever found, not herein or otherwise disposed of, on condition that he, the said Rowland, pay, or cause to be paid, all my just debts, the foregoing legacies, funeral charges, and the expense of settling my estate." The defendant also proved who were the members of the "yearly meeting," thirty-three in number. To prove that said "yearly meeting" was a corporation, no charter was exhibited, but the defendant produced in evidence a multitude of votes and proceedings from their records, extending from 1683 to the commencement of the suit, from which he claimed that an incorporation should be presumed. These votes and proceedings showed that from time to time persons had been designated who were "desired to keep the yearly meeting book," to be clerk, to act as treasurer, "to keep the stock that belongs to this meeting," etc., that persons had been appointed to sell the right and privilege of the yearly meeting in certain property bequeathed to them; that the treasurer had been ordered from time to time to defray "all necessary charges that may arise," "out of the money left in his hands;" that the yearly meeting had given "allowances" to the Friends in Providence and elsewhere, "to hire money," not exceeding a specified sum, "to be discharged by the meeting," for the purpose of building meeting-houses in those places; that committees had been appointed to settle with the treasurer and report the balance due the meeting; that propositions for raising money for particular years had been approved; and that "the several quarterly meetings" in Rhode Island, Salem, Sandwich, Falmouth and Smithfield, had been "requested to raise" the proposed amount and forward the same to the treas-

urer, and an account to the next yearly meeting, different sums being specified to be raised by each.

The judge instructed the jury that the members of the yearly meeting could not take as individuals for the purposes mentioned in the will; that the votes and acts of the society, however long continued, would not authorize the presumption of an incorporation unless they were such as could not be performed by an unincorporated society; and that if the devise to the yearly meeting was void for uncertainty for want of an incorporation, the farm would descend to the heirs at law, and would not pass to the residuary legatee. Verdict for the plaintiffs, and a motion for a new trial on the ground of misdirection.

Cleaveland and Judson, for the motion, argued: 1. That the devise was good as a devise to the individuals composing the yearly meeting at the testator's death, since though not particularly named, they could be ascertained by the description: *Bartlet v. King*, 12 Mass. 537 [7 Am. Dec. 99]; 2. That if the individuals could not take the yearly meeting could take as a corporation, there being sufficient evidence of uses from which to presume an incorporation: *Stockbridge v. West Stockbridge*, 12 Mass. 400; *Read v. Brookman*, 3 T. R. 158; *Mayor of Kingston upon Hull v. Horner*, Cowp. 102, 110; *Roe v. Ireland*, 11 East, 280; 3. That if the foregoing propositions were incorrect, the devise was still good as a charity: 4 Wheat. App. 11, 17; *Bishop of Hereford v. Adams*, 7 Ves. 324; *White v. White*, Id. 423; *Baptist Association v. Hart*, 4 Wheat. 1. So, even though the statute of 43 Eliz. c. 4, be not in force here, since that statute was not designed to give validity to devises which would be invalid without it; but that the Connecticut statute, 301, tit. 56, sec. 3, proceeded upon the same principle as the statute of Elizabeth, and gave effect to charitable devises; 4. That if the devise to the yearly meeting were void the farm would nevertheless pass to the residuary devisee: *Crane v. Crane*, 2 Root, 487; Com. Dig., tit. Chancery, 3 Y. 13.

Goddard and H. Strong, contra, claimed: 1. That the devise was not to any certain individuals, the membership of the meeting being uncertain and variable, and that the community composed of those members could not take unless it were a corporation: Perk. sec. 55; *Barker v. Wood*, 9 Mass. 419; *Jackson v. Cory*, 8 Johns. 388; *Hornbeck v. Westbrook*, 9 Id. 73; *Baptist Association v. Hart*, 4 Wheat. 1; 2. That the acts relied upon as a user from which to presume an incorporation were

insufficient, as all of them could have been performed without an incorporation, and even if the evidence were sufficient to prove an incorporation, it did not follow that the corporation had power to hold real estate or to be seised to an use: *Hart v. Chalker*, 5 Conn. 311; Com. Dig., tit. Bargain and Sale, B. 3; 3. That the devise being void, the heir would take in preference to the residuary devisee: 2 Mad. Ch. 81; *Gravenor v. Hallum*, Amb. 643; *Watson v. Earl of Lincoln*, Id. 328; *Attorney-general v. Johnstone*, Id. 580; *Wright v. Hall*, Fortesc. 182; *Roe v. Fludd*, Id. 184.

HOSMER, C. J. The precise question to be determined is whether the yearly meeting or Rowland Greene, in reference to the land in question, are the devisees of Sylvester Wickes. If they are not, the defendant, who founds himself on being their lessee, must fail in his defense. Before entering on the inquiry necessarily involved in the case I will disembarass it of some considerations urged by the defendant's counsel.

It has been insisted that if a bequest be for a charity, it matters not how uncertain the persons or objects may be, or whether the devisee be a corporation capable in law of taking; and in support of the principle a number of determinations of chancery have been cited. The irrelevancy of the decisions referred to, in relation to the legal title of the parties in this case, is perfectly obvious. The courts of equity have gone great lengths in support of bequests for charitable purposes, and have frequently coerced the execution of them when no legal title had been created. The devise of lands to the churchwardens of a parish, who are not a corporation capable of holding lands, for a charitable purpose, though void at law, has been sustained in equity: Com. Dig., tit. Chancery, 2 N. 2; *Attorney-general v. Combe*, 2 Ch. Cas. 18; *Attorney-general v. Bowyer*, 3 Ves. jun. 714; *Mills v. Farmer*, 1 Meriv. 55. So, if a devise be to an existing corporation by a misnomer, which makes it void in law, chancery will afford relief: *Anon.* 1 Ch. Cas. 267; *Attorney-general v. Platt*, Rep. temp. Finch, 221. These determinations, and many others of a similar character, have been made in equity; and if there were an application to this court, as a court of chancery, for the execution of a trust, they would have a bearing on the subject of inquiry; but towards the point now under discussion they have no direction. The case of *Bartlet et al v. King, exr.*, 12 Mass. 537 [7 Am. Dec. 99], was cited for the defendant; and the determination proves this position, that where there is a devise in trust to persons capable of taking as trustees, for the use of

a voluntary association, the *cestuis que trust* may avail themselves of it as individuals. But the inquiry here is in relation to the legal capacity of the trustees, and not of the *cestuis que trust*; and hence the case cited is entirely inapplicable to the question before the court.

The defendant's counsel have referred to the third section of the statute concerning lands: tit. Lands, sec. 3, which provides that real estate "given or granted" for public and charitable uses, shall remain to such uses and no other. But the property must be "given or granted" before it falls within the purview of this law; and whether this is the fact is the question put for our determination. The law above cited has no bearing on the inquiry concerning the legal title, the only inquiry in the case. Before attending to the questions presented, it may not be unuseful to state a few of the established rules for the construction of devises. A last will must have a favorable interpretation, and as near to the mind and intent of the testator as may be; but this intention must stand with the rules of law and not be repugnant thereunto: Shep. Abr., part 10, voc. Testament; Powell on Devises, 426. It is likewise a settled principle that the construction of a will must be derived from the words of it and not from an extrinsic averment.

1. Can the members of the yearly meeting of the people called Quakers take and hold the premises as individuals? This is the first inquiry. In what manner the yearly meeting was composed, the motion does not state; but throughout the argument it has been admitted, and without the admission it is too obvious to be questioned, that the members of it assemble by delegation. The yearly meeting, it was said, is composed of representatives from the quarterly meetings, and such other members of the society within its limits as may be present. It is very unnecessary precisely to ascertain the composition of this meeting. Two positions, in my opinion, are indisputably certain. The first is that it was the intention of the testator to devise the estate in question to the yearly meeting, and not to the individuals composing it. Hence it is given to this assemblage, "and to their successors." Perhaps this distinction is unimportant; for whether the devise was to the yearly meeting, or to the members constituting it, the legal result will be the same. The devise, in either event, was not to any certain individuals; but to the members of an assembly meeting together annually, and to such other members of this variable body in endless succession, as by delegation should compose it. There

was no antecedent certainty that those who were the members of the yearly meeting at the death of the devisor, would continue such a single year; but in all probability there would be an annual change of at least part of the members, and beyond all doubt within no distant period, they would all be swept from the stage of action.

And what decisively shows the devisor's intention; anticipating this fluctuation, he provides for the performance of the trust, by designating the successors of the yearly meeting, and treating that body as if it were a corporation. It is obviously opposed to the intention of the devisor, to construe the devise as vesting an estate in the individuals of the yearly meeting, being members of it at his death; and then to continue the estate in them, after they had ceased to be members. The words of the devise give the property in question to the members of the yearly meeting, and their successors, unquestionably intending that none but members should have any part in it; and the nature of the case speaks the same language. It was the testator's object to execute a perpetual trust; and this he would have done if the yearly meeting was a corporation, capable of becoming trustees of the estate devised. But if the individuals existing at his death, and being members of the meeting, were invested with the land devised in fee-simple, what would become of the trust on their ceasing to be members? Scattered over a wide extent of country, without any necessary or conventional meeting, their duty as trustees they would be incapable of performing. This is the most favorable view of the subject. Soon, by death, some of the individuals would leave no heirs, others would leave numerous minor children; the number of the trustees would increase astonishingly, and the difficulties every moment would thicken, and be more and more insuperable. It is repugnant to common sense to ascribe to the testator the absurd intention of constituting the individuals living at his death his trustees. There can exist no doubt, then, that the devise in question was to the yearly meeting constituted such by delegation, or to the members of it, in endless succession.

The second position alluded to is, that the testator's intention is repugnant to the rules and principles of law. This point is too clear to require discussion. A corporation alone, authorized by the sovereign power and vested with perpetual succession, is capable of fulfilling the testator's intention. I will cite a few only of the authorities applicable to this point,

and dismiss it. A grant to the parishioners or inhabitants of Dale, or to the commoners of a certain waste, and such like grants, are utterly void for uncertainty: Co. Lit. 3 a; Shep. Touch. 235. So a devise to the inhabitants of Boxford, living within the north-west parish: *Barker v. Wood*, 9 Mass. 419. So a grant to the people of the county of Otsego: *Jackson ex dem. Cooper et al. v. Cory*, 8 Johns. 385, 388. So a reservation in a deed to the inhabitants of Rochester: *Hornbeck v. Westbrook*, 9 Johns. 73.

The case of the *Baptist Association v. Hart's executors*, 4 Wheat. 17, is in no essential particular distinguishable from the case before the court. It was founded on a devise to the Baptist Association, that for ordinary meets at Philadelphia, annually, as trustees of certain military certificates, to constitute a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising for the ministry. By the court it was held that the association, not being incorporated at the testator's decease, could not take this trust as a society; and that the bequest could not be taken by the individuals who composed that association at the death of the testator. In assigning their reasons, it was said by the court that it was obviously the intention of the testator that the association should take in its character as an association; and that, not being incorporated, it was incapable of taking this trust as a society; and the court was decidedly of opinion that the individuals composing the association at the death of the testator could not take. "No private advantage was intended them; nothing was intended to pass to them but the trust; and that they are not authorized to execute as individuals." "It is the association, forever," said C. J. Marshall, "not the individuals who at the time of the testator's death might compose the association, and their representatives, who are to manage this perpetual fund." From the cited cases it is unquestionable that the devise to the yearly meeting, if it was not incorporated, was void.

2. The next question that arises in the case is, whether the yearly meeting was a corporation, capable of holding land in trust. By a corporation is understood, in contradistinction from a voluntary association of individuals, a society created by the sovereign power. At the trial of this cause, no charter of incorporation was exhibited. It, however, was contended from a long and continued exercise of certain acts, that an incorporation ought to be presumed. That a grant or charter is presum-

able from the long continued exercise of authority is indisputable, and has not been disputed; and all the cases cited by the defendant's counsel tend only to prove this unquestionable principle. The inquiry in this case involves no question of law, and turns entirely on a point of fact. Admitting all the acts done by the yearly meeting, for more than a century to have been lawful, do they warrant the presumption that they were incorporated? This is the precise inquiry, and in his charge to the jury, the judge recognizing the law of presumptions, instructed them, that the acts done must have been such as an unincorporated Yearly Meeting could not have performed. When fairly construed the following was virtually the opinion expressed. If the acts done by the yearly meeting bear on the face of them the impress of corporate acts; such as individuals can not, and a corporation alone is competent to perform; you may presume the yearly meeting to be a corporation; but if their acts were within the competency of individuals to perform, they furnish no ground to presume that they were other than the acts of individuals. The inference to be drawn, by the jury, was of a fact inquired after from facts established; and their reasoning was to be from the effect to the cause. The law made no inference on the subject, nor gave to the testimony a technical efficacy, beyond its simple and natural operation. The principle had before been recognized in *Hart v. Chalker*, 5 Conn. 311. "A usage," said the court, "supposed to be founded on a grant or agreement, determines the extent of the supposed grant or agreement. The right granted is supposed to be commensurate with the right enjoyed. They are different *media* proving precisely the same fact; and it is because of this identity of proof that the usage is supposed to evince the grant. In short, like a seal, with its correspondent impression, the grant and the usage are, in point of proof, precisely and identically the same. The principle declared by the judge, was, unquestionably, correct; and the verdict of the jury necessarily implies that the yearly meeting was not a corporation.

From the evidence exhibited, and spread on the motion before us, my mind is led to the same results. Every act of the yearly meeting is entirely reconcilable with the belief that it was done by persons, not by virtue of corporate authority, but as a voluntary association of individuals. Let it be supposed that the members of the yearly meetings were a delegation, to whom was confided the supervision of the spiritual concerns of the people called Quakers; that by voluntary contribution of their

constituents and others, they were invested with funds to this end; and that they directed the general concerns and the application of their funds, by joint agreement, and with no more of compulsion than is implied in the voluntary and cheerful acquiescence of those whose interests they were pursuing. Superadd to this that they kept records of their proceedings; that they appointed a clerk and treasurer; that they held lands as individuals, for the general advantage; that they advised the payment of money, and sent to the respective quarterly meetings for their proportion; that in fact, they celebrated marriages, had burying places; and admitted members of their meeting or discarded them.

Every one of these acts might be done by them as individuals, without corporate authority and without coercion, except over their own funds. Their organization, for the transaction of business and disposing of their property, with a president at their head (which, I believe, did not exist), with their clerk and treasurer, and minutes of their proceedings, were nothing more than is usually done by an unincorporated library company or bible society, or other voluntary assemblies. It does not appear that land or property of any kind was held by the yearly meeting, unless as tenants in common; or that a tax was laid by them, other than an appointment for a voluntary contribution; nor is there exhibited in their constitution, organization, or proceedings, one mark or *indicium* of a corporation. Nothing was done by them beyond the competency of individuals. So far as the testimony adduced may be relied on, the members of the yearly meeting have never exercised one of those incidents which necessarily and inseparably are annexed to every corporation. They have no perpetual succession, the primary object of corporate authority; there has been no suing or being sued: no granting and receiving; no holding of lands or estate for their own use, or that of others as a corporation; no common seal by which the intention of a corporate body is manifested; and no by-laws for the better government of themselves. They appear to have had the capacity of agreeing, of advising and of disposing of their own, as individuals, and beyond this no capacity of theirs is discerned. The inference from such premises that the yearly meeting was incorporated would be as groundless as the supposition that an individual, by virtue of his personal acts, gives proof of his being a corporation.

It is not sufficient for the defendant to show that the yearly meeting was a corporation; but he must proceed further and

prove that it is authorized by virtue of its corporate powers, to hold property in trust for others. Such confidence is not incidental to every corporation, but in general it is foreign to the end of its institution. Hence, a corporation can not be seised of land to the use of another: Bro. Abr., tit. Feoffment, D.; Cruise on Uses, 22; unless it has explicit authority for this purpose. Now, what act was ever exercised by the yearly meeting, from which this power may be presumed? No such act appears; and hence the presumption of the corporate power in question can not be made. I conclude then that the yearly meeting never was a corporation; and if it were, that it never had the capacity of becoming a trustee for others.

3. It remains for consideration: the devise in question to the yearly meeting being void, whether the land demanded descended to the heirs at law of devisor, or were transferred to the residuary devisee. In relation to real estate, it is an established principle that in case of a lapsed devise, the estate does not vest in the residuary devisee, but descends to the heir at law of the testator. Wills must be construed by the intent of the devisor at the time of making them. Of consequence, when property is given to a person incapable of taking, and there is a general devise of the residue, so far as respects the estate specifically devised at the time of the will's being made, there is an intentional disposition; and it never was designed that it should fall into the residuum. The law respecting the bequest of personal estate is different; but as to the realty, the decisions have been uniform and unquestioned: *Wright v. Hall*, Fortes. 82; *Roe v. Fludd*, Id. 182; *Doe d. Morris et al. v. Underdown*, Willes, 293; *Watson et al. v. Earl of Lincoln et al.*, Amb. 338, 339; *Attorney-general v. Johnstone*, Id. 580; *Gravenor v. Hallum*, Amb. 643, 645; 2 Mad. Ch. 81. The case of *Crane v. Crane*, 2 Root, 487, scarcely requires being mentioned, by way of exception, as it was little discussed, and without citation of any authority.

The other judges were of the same opinion.

New trial not to be granted.

DEVISE TO CHARITABLE USES.—The law on this subject is discussed at length in the note to *Dashiell v. Attorney-general*, 9 Am. Dec. 577, where the American cases, including *Greene v. Dennis*, are collected and reviewed. In *Brepster v. McCall*, 15 Id. 297; *American Bible Society v. Wetmore*, 17 Id. 188; and *White v. Fisk*, 22 Id. 55, the principal case is noticed as an authority on this point. The doctrine here laid down, that where a devise fails for want of certainty in the devisee, the heir is entitled to the subject of

the devise in preference to the residuary devisee, is approved in *Brewster v. McCall*, 15 Conn. 297. In *Treat v. Treat*, 35 Id. 215, the method here pursued of bringing an action to determine whether a devise is invalid for want of certainty in the devisee, was referred to with approval, and it was held that the probate court has no power to declare a forfeiture of a devised estate.

THE STATE v. KNAPP.

[6 Conn. 415.]

HIGH CRIMES AND MISDEMEANORS are such immoral and unlawful acts as are nearly allied and equal in guilt to felony, yet, owing to some technical circumstance, do not fall within the definition of felony. The obstruction of a highway is not a high crime and misdemeanor.

INFORMATION in the superior court, by the state's attorney against the defendant, for obstructing a public highway by erecting a stone wall extending ten feet into and towards the center of said highway, whereby the highway was alleged to be "greatly narrowed, obstructed and rendered almost wholly impassable." The defendant admitted the erection of the wall, and pleaded that for more than fifty years the said highway "has been, and now is, three rods in width; and that the citizens of this state," at the time of the erection and since, "could safely pass and repass through and upon said highway, and that the same was not, and is not, greatly narrowed," etc., "and that the public travel thereon is not at all incommoded." Demurrer to the plea and case reserved for the advice of this court.

N. Smith and Betts, for the demurrer, contended: 1. That the erection of a stone wall, or of any other unauthorized obstruction in any part of the highway, was an indictable offense at common law: 2 Swift's Dig. 350, 351; *King v. Russell*, 6 East, 427, which was not abrogated by statute; 2. That this offense was cognizable in the superior court as a high crime and misdemeanor.

Bissell and T. T. Whittlesey, contra, insisted: 1. That if the erection of a stone wall in the highway, which did not incommodate public travel, was an offense at common law, it was abrogated by the statute relating to nuisances in highways, which provided the only mode of procedure in such cases, and that there could be no prosecution for an offense as an offense at common law, where the case was covered by statute: *State v. Danforth*, 3 Conn. 112; 2. That this was not a "high crime and misdemeanor," cognizable by the superior court.

PETERS, J. My own opinion of common law crimes and punishments was fully expressed in *State v. Danforth*, 3 Conn. 112, which remains unaltered; and although I am unable to comprehend the ground on which that case was decided, I am bound by its authority so long as it remains unimpeached by a contrary decision. It is, therefore, my duty to say that the superior court has jurisdiction of high crimes and misdemeanors at common law; and the only question for me now to decide is, do the facts alleged in the information constitute such an offense? "High crimes and misdemeanors," says Russell, "are such immoral and unlawful acts as are nearly allied and equal in guilt to felony, yet, owing to some technical circumstance, do not fall within the definition of felony:" 1 Russell on Crimes, 61. "The idea of felony," says Sir William Blackstone, "is so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform."

By statute, tit. 22, sec. 98, the superior court has cognizance of all offenses whereof any part of the punishment is death, confinement in Newgate, or incapacity to hold office, and also of high crimes and misdemeanors. If the offense in question be cognizable by the superior court, it must be nearly allied and equal in guilt to the crimes so punishable, such as murder, arson, rape, burglary, robbery, forgery, perjury, and many other atrocious crimes and felonies, not to be mentioned among christians. To which of these horrid crimes are the act in question nearly allied or equal? Surely they are not, in the language of Lord Coke, *animo felleo perpetrata*: Co Lit. 391, a. Is it possible that a wise legislator, or a learned, humane, and independent judge, would doom a fellow citizen to the gallows, or the cells of Newgate, for erecting a pig-pen or planting a tobacco patch on the highway, and without impeding the public travel. As well might Hercules be called upon by the indolent wagoner to give him a lift, as the superior court to abate nuisances and remove encroachments from the highways. "*Ne deus intersit nisi dignus vindice nodus*:" Hor. de Art. Poet, a.

But I do not wish to be understood as saying that the facts alleged do not constitute an offense. They certainly are a nuisance, or an encroachment, punishable by a justice, and removable by the selectmen, or any other person.

I therefore advise the superior court to render judgment for the defendant.

The other judges were of the same opinion.

Judgment to be rendered for the defendant.

RECOGNIZED AS AUTHORITY for the position that the obstruction of a highway, though an offense at common law is not a "high crime or misdemeanor," in *State v. Smith*, 7 Conn. 430; *State v. Hyde*, 11 Id. 543. In *Burnham v. Hotchkiss*, 14 Conn. 321, the opinion above expressed by Peters, J., that any one may abate a common nuisance, is approved. In *State v. Merrit*, 35 Conn. 317, the principal case is cited on the point that an unauthorized erection in a public highway is a nuisance, although it does not encroach upon the actually traveled path.

MAGILL v. HINSDALE.

[6 Conn. 464 a.]

A TENANT OF A MORTGAGOR may attorn to the mortgagee, after the mortgage has become forfeited, and may thereupon successfully defend an action brought against him by the mortgagor upon the lease.

AGENT, EXECUTION OF DEED BY.—No particular form of words is necessary for an agent to bind his principal, provided it appears from the instrument that he intended it as the act of his principal. Where this intent appears, the signature may be "A, as agent of B."

ASSUMPSIT for the use and occupation of certain premises. The premises were set off to the plaintiff under an execution against the Middletown Manufacturing company, levied August 12, 1820. On March 1, 1823, the plaintiff demised the premises for a year to the defendants who had previously occupied the same by his permission, and had paid him rent therefor. The rent was paid in advance to December 1, 1823. In October, 1823, the defendants took a lease of the same premises from the Middletown Bank, and paid the rent to said bank to January 1, 1825. Afterwards, until May 1, 1825, they occupied, without lease or payment of rent, and then delivered possession to the plaintiff. The defendants claimed that the Middletown Bank were the real owners. They proved a vote of the Middletown Manufacturing company, passed March 29, 1817, duly authorizing Arthur W. Magill, as their agent, to make a mortgage deed, with warranty to the Middletown Bank of the real estate of the company, as security for debts due from the company to the bank. They also gave in evidence a deed executed to the said bank by the said Magill in pursuance of said authority, and duly witnessed, acknowledged and recorded, conveying the premises to the said bank, and conditioned to be void on the payment of sundry notes due from the company to the bank. The granting part of said deed was in the following form: "Arthur W. Magill, agent for the Middletown Manufacturing company, being empowered by a vote,"

etc., "for and in behalf of said company," etc., "do give, grant," etc. The covenants ran as follows: "I do hereby covenant for and in behalf of said company," etc., that "said Middletown Manufacturing company is well seised," etc., "and I do also bind said Middletown Manufacturing company to warrant and defend," etc. The conclusion was as follows: "In witness whereof I have hereto, for and in behalf of said Middletown Manufacturing company, set my hand and seal, at Middletown, this twenty-ninth day of March, A. D. 1817. Arthur W. Magill, [L. s.], agent for the Middletown Manufacturing company." The plaintiff objected to the evidence: 1. That the charter of the company did not authorize the conveyance of real estate unless taken for debt; 2. That the defendants being tenants to the plaintiff were estopped to deny his title; 3. That the deed was executed in the name of the agent. The judge admitted the evidence, and the jury, by direction of the court, found a verdict for the defendants. Motion for a new trial on the ground of misdirection.

Stanley, for the motion, referred to the charter of the company as containing no power to convey real estate; and as to the point that the deed should have been executed in the principal's name, he cited: *White v. Cuyler*, 6 T. R. 176; 1 Swift's Dig. 131; Com. Dig. tit. Attorney, c. 14. He also cited: *Hayne v. Mallby*, 3 T. R. 441, 442; Esp. Ev. 42-47, to the point that the defendants were estopped to deny the plaintiff's title. He further claimed that the relation of mortgagor and mortgagee never subsisted between the plaintiff and the bank, for the plaintiff's execution was levied on the land and not on the equity of redemption, and therefore conveyed no title, if the deed to the bank was valid: *Scripture v. Johnson*, 3 Conn. 211; and that even if the relation of mortgagor did exist, the defendants could not attorn to the bank and set up such attornment as a defense.

N. Smith and Sherman, contra, contended: 1. That the deed executed by Magill was binding on the company, the fact of the agency and the authority to make the deed being disclosed on the face of the instrument: *Mauri v. Hefferman*, 13 Johns. 58, 77; *Rathbon v. Budlong*, 15 Id. 1; *Hovey v. Magill*, 2 Conn. 682; 2. That the defendants might lawfully pay the rent to the bank as mortgagee, and be protected against the claim of the plaintiff whose right, if any he had, was that of the mortgagor: *Moss v. Gallimore*, Doug. 279; *Jones v. Clark*, 20 Johns. 51.

PETERS, J. 1. As the charter of the Middletown Manufacturing company, is a private statute, and not before us, the construction and extent of its provisions must be laid out of consideration. As they owned the land in question, they of course had power to mortgage it. Had they delegated this power to the plaintiff? This seems to be admitted. Has he executed this power? This is denied, because he executed the deed in his own name, and not in the name of the corporation.

2. It is a general rule that a tenant can not deny the title of his landlord: *Merwin et al. v. Camp et al.*, 3 Conn. 35. But the defendants have not done or attempted such an act. They had merely attorned to their lord paramount. If the legal estate passed to the bank by the mortgage executed by the plaintiff, he acquired the equity of redemption only by the levy of his execution. His tenants were liable to be treated as tortfeasors, which they might lawfully avoid by submission to the claim of his mortgagee: *Rockwell v. Bradley*, 2 Conn. 1; *Wakeman et al. v. Banks*, 2 Id. 445. In *Jones v. Clark et al.*, 20 Johns. 51, it was decided by the supreme court of New York that the tenant of a mortgagor in possession, after the mortgage has become forfeited, during the continuance of the lease from the mortgagor, may attorn to and take a lease from the mortgagee; and in an action brought against him by the mortgagor for rent under his lease he may set up such attornment as a legal defense. The same point was decided by the chief justice, in *Atwater v. Eaton*, at New Haven, in August, 1825.

3. No particular form of words is necessary for an agent to bind his principal, if he expresses in the instrument the capacity in which he acts. Deeds are to receive a construction from the whole taken together, and every deed ought to be so construed as to effect the intention of the parties, *ut res magis valeat quam pereat*: *Wilks et al. v. Back*, 2 East, 142. In *Hovey v. Magill*, 2 Conn. 682, Swift, C. J., delivering the opinion of the court, remarks, that no precise form of words is required to be used; that every word must have effect if possible, and that the intention must be collected from the whole instrument taken together. Who can entertain a doubt, upon reading the deed in question, that it was the intention of the plaintiff to bind the company? In *Combes's case*, 9 Co. Rep. 75, 77, it was resolved, that when any one has authority to do any act, he ought to do it in his name who gives the authority; but where it was objected that the attorneys had made the surrender in their own names, for the entry was: *Quod idem Willielmus et Stephanus, etc., sursum reddiderunt, etc.*,

it was answered and resolved *per totam curiam*, that they had well pursued their authority; for, first, they showed their letter of attorney, and then *auctoritate eis per prædictam literam attorney datam sursum redidderunt, etc.*, which is as much as to say: "We, as attorneys of Thomas Combes, surrender," etc., and both these ways are sufficient, as he who has a letter of attorney to deliver seisin, saith: "I, as attorney to J. S., deliver you seisin;" or, "I, by force of a letter of attorney, deliver you seisin," and all that is well done.

In *Stinchfield v. Little*, 1 Greenl. 231 [10 Am. Dec. 65], it was said by the supreme court of Maine, that where a contract is entered into, or a deed executed in behalf of the government, by a duly authorized public agent, and the fact so appears, notwithstanding the agent may have affixed his own name and seal, it is the contract or deed of the government, who alone is responsible. But, they add, the same rule does not obtain in relation to the agent of an individual or a corporation; but I perceive no reason for this distinction. And the supreme court of New York, in *Rathbon v. Budlong*, 15 Johns. 1, expressly say, that, in fact, there is no difference between the agent of an individual and of the government. Upon this point this case is not distinguishable from the case of *Hovey v. Magill*, 2 Conn. 680, wherein this plaintiff executed a promissory note in the same manner, for the same principal, and this court held that this principal was bound, and not the agent.

I am, therefore, of opinion, that there ought not to be a new trial.

BRAINARD, LANMAN and DAGGETT, JJ., concurred.

HOSMER, C. J., gave no opinion, being related to one of the parties.

New trial not to be granted.

DEED BY AGENT.—As to when a principal is bound by his agent's deed, see *Scott v. McAlpin*, 7 Am. Dec. 70, and note; *Elwell v. Shaw*, 8 Id. 126; *Bellas v. Hays*, 9 Id. 385; *Stinchfield v. Little*, 10 Id. 65; *Locke v. Alexander*, 11 Id. 750; *Johnson v. Smith*, 21 Conn. 633, citing the principal case.

MORSE v. WELTON.

[6 Conn. 547.]

MINOR'S SERVICES.—An agreement by a parent with his minor child to relinquish his right to its services or earnings is valid and irrevocable.

ACTION of book debt brought in the superior court. Plea, the general issue. The plaintiff's claim was for services rendered

by his minor son to the defendant pursuant to a contract made between the said minor and the defendant, which contract the plaintiff insisted was made for his benefit. He also claimed that after the son had worked six months under the contract, and had earned sixty dollars, he, the plaintiff, notified the defendant not to pay the son his wages. The defendant claimed to have proved an agreement between the father and son, whereby the former had sold the latter his time for fifty dollars for the period during which the son was in the defendant's employ, and had agreed that the son might during said period contract on his account to work for the defendant or any one else, and that the contract between the defendant and the son was made without the privity of the plaintiff. He also claimed that the action of book debt would not lie. The judge instructed the jury in substance that if the agreement between the father and the son was made as claimed by the defendant, it was revocable at any time by the father as a mere license; that if the plaintiff notified the defendant not to pay the wages to the son, any payment made to the son afterwards was no defense, and the plaintiff might recover; and that book debt was the proper form of action. Verdict for the plaintiff, and the defendant, having excepted to the charge, sued out a writ of error, which was reserved for the advice of this court.

R. S. Baldwin and Kimberley, for the plaintiff in error, contended: 1. That a father's right to his infant son's services arises merely from his obligation to support and educate him: 1 Bl. Com. 453; *Benson v. Remington*, 2 Mass. 113; 2. That a contract whereby a father relinquishes his right to his son's services for a future definite period is valid and binding, and, therefore, irrevocable by the father, and that for services rendered by the son during such period, the son, and not the father, has the right of action: *Jenney v. Alden*, 12 Mass. 375; *Nightingale v. Withington*, 15 Id. 272 [8 Am. Dec. 101]; *Whiting v. Earle*, 3 Pick. 201; *Burlingame v. Burlingame*, 7 Cow. 92; 3. That book debt was not the proper form of action: *Swift's Ev.* 83.

N. Smith and Townsend, for the defendant in error, insisted: 1. That the alleged contract between the plaintiff and his son was invalid as being opposed to sound policy and inconsistent with the relation of parent and child: *Adams v. Oaks*, 20 Johns. 282, 285; 2. That the action was in proper form: 3 Day, 37; 4 Id. 105; 2 Conn. 215.

PETERS, J. By the common law, a father is entitled to the services of his minor children. This right is bottomed on his duty to maintain, protect, and educate them. But this right and his duty may be transferred to another (Bl. Com. 472; 1 Swift's Dig. 41, 61), and may be relinquished to a child; and the earnings of the child can no more be taken away by a father than a gift delivered. Such a gift may be void against creditors, but it is valid against the giver. "The law," says C. J. Parsons, in *Benson v. Remington*, 2 Mass. 113, 115, "is very well settled that parents are under obligations to support their children, and that they are entitled to their earnings. It is true, parents may transfer this right and authorize those who employ their children to pay them their own earnings." So in *Jenney v. Alden*, 12 Mass. 275, 378, where a father agreed with his minor son that he should have the benefit of his earnings, which, being received by the father, were vested in land, and a deed was taken in the son's name; "this agreement," said the court, "was a lawful one, and the money received by the father from the earnings of the son may be equitably considered as the money of the son."

In *Whiting v. Earle et al.*, 3 Pick. 201, 202, where a minor son made a contract for his services, on his own account, and the father knew it, and made no objection, it was said, by Parker, C. J., in giving the opinion of the court: "That although the general principle is clear that a father is entitled to the earnings of a son, while under age, yet the court thought it equally clear that he might transfer to the son a right to receive them." This is necessary for the encouragement of young men; and it is often convenient for the father, wishing to be relieved from the burden of supporting his son to allow him, in this manner, to support himself; where such a contract is entered into without any fraud, for the advantage of the son, on the principles of common justice, and according to decided cases, he is entitled to the profits of his own labor. We go as far as to say that where a minor son makes a contract for his services, on his own account, and the father knows of it, and makes no objection, there is an implied assent that the son shall have his earnings: See *Burlingame v. Burlingame*, 7 Cowen, 92. As the cause of the plaintiff below has no merits, the form of action is immaterial.

I advise that the judgment of the county court be reversed.

The other judges were of the same opinion, except BRAINARD, J., who was absent.

Judgment to be reversed.

In *Johnson v. Terry*, 34 Conn. 263, it was held that the doctrine here laid down, that a father may make a valid contract with his minor child relinquishing his right to the latter's earnings, did not authorize the position that he may also divest himself of his right to the custody and control of such minor, even by a contract with the mother. In *Atwood v. Holcomb*, 39 Conn. 273, the doctrine of the principal case was recognized as sound, and it was determined that an insolvent father may make a valid gift to his minor son of his time and future earnings.

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MANSFIELD v. MANSFIELD.

[6 Conn. 559.]

REVOCATION—A **NAKED POWER** or authority may be revoked at pleasure. A power or authority coupled with an interest is irrevocable.

A **POWER COUPLED WITH AN INTEREST** exists when the person to whom the power is given derives a present or future interest in the subject over which the power is to be exercised. The interest must be in the thing itself and not in the execution of the power merely.

A **POWER TO SELL AND CONVEY** is a naked power and is revocable.

SURVIVAL OF POWER.—A power coupled with an interest, as where it is given to secure a debt, may be executed, notwithstanding the death of the principal.

APPEAL to the superior court from a decree of the probate court in favor of the heirs, and against the widow, of Joel Mansfield, deceased.

Samuel J. Hitchcock and Ralph I. Ingersoll, esqrs., appeared as attorneys for Mrs. Mansfield, the appellant, to prosecute the appeal, and exhibited a power executed to them by Mrs. Mansfield, dated June 8, 1825, whereby, in consideration of her indebtedness to them, upon two notes dated on the same day, she appointed them each her "true and lawful attorney, jointly and severally," etc., "to obtain, sue for and prosecute, and settle and discharge, and finally adjust, all such claim or claims" as she might have on the estate of her late husband for "dower in his real and personal property," ratifying and confirming all their acts in that behalf in the probate court or any other court, and authorized them "to sell and convey, by good and valid conveyance," in her name, "all such lands, tenements and hereditaments as she then owned and also all such as she had or might have set out to her as dower in the real estate of her said husband," and after paying themselves all due to them, or to one Staples, and all expenses, to account with her for the balance; and also empowered them to prosecute for her benefit any breaches of the administrator's bond or any other causes of action which

she might have against the administrator or any other person. W. W. Boardman, esq., exhibited a power of attorney from Mrs. Mansfield, dated March 31, 1827, authorizing him to take the care and management of all actions, suits and appeals in her behalf, and particularly the appeal in question, and revoking all powers of attorney previously granted, and moved to withdraw the appeal. The court, holding that Mr. Boardman was the lawfully constituted attorney of Mrs. Mansfield, granted his motion. Messrs. Hitchcock and Ingersoll, as attorneys for Mrs. Mansfield, on motion in error under the statute, brought the case here for revision.

Ingersoll and Hitchcock, in support of their claim, contended that the power given them, being executed as security for a debt due them, was coupled with an interest and therefore irrevocable: *Walsh v. Whitcomb*, 2 Esp. 565; *Raymond v. Squire*, 11 Johns. 47; *Anderson v. Van Alen*, 12 Id. 343; *Gram v. Cadwell*, 5 Cow. 489; *Hunt v. Rousmanier*, 8 Wheat. 174.

N. Smith and W. W. Boardman, contra, contended: 1. That a writ of error would not lie in this case because the facts did not appear by the record, and because the point determined was matter of discretion; 2. That there was no vested interest to keep the power alive and it was, therefore, revocable: *Peabody v. Harvey*, 4 Conn. 119 [10 Am. Dec. 103]; *Hunt v. Rousmanier*, 8 Wheat. 174, 204, 207, and that in Connecticut a party to the record may control the suit even after assigning his interest: 1 Swift's Dig. 437; *Bulkley v. Landon*, 3 Conn. 76.

HOMER, C. J. Jurisdiction is vested in this court of all matters brought here, by way of error, from the judgments or decrees of any superior court, wherein the rules of law or principles of equity, appear from the files, records or exhibits of said court, to have been mistakenly or erroneously adjudged and determined: Stat. 137. But in this case, from the files, records and exhibits of said court, no error is apparent. The powers of attorney appear from the finding of the judge, and not from the records of the court; and the inquiry raised is as collateral to the record as if facts had been found to try the question whether testimony had been unduly admitted. I have been led to notice this irregularity in order to prevent its happening in future, and not to avoid any examination of the point intended for determination. The decision of the superior court was correct on two distinct grounds: 1. The power of attorney to Messrs. Ingersoll and Hitchcock was not coupled with an in-

terest, and therefore was revocable; 2. If it had been, it was revocable by the law of this state *pro tanto*; that is so far as it relates to a prosecution of suits in Mrs. Mansfield's name.

1. As a general legal truth, it is indisputable that a naked power or authority is revocable at pleasure: Co Lit. 112, b., 113, a.; Shep. Touch. 429; and that a power or authority, coupled with an interest, is irrevocable: *Bergen et al v. Bennett*, 1 Cai. Cas. Err. 15 [2 Am. Dec. 281]. The inquiry before the court is, whether the power in question was coupled with an interest; and to decide correctly on this subject, it is necessary that we clearly understand what is the legal meaning of this expression. A naked power exists when authority is given to a stranger to dispose of an interest in which he had not before, nor has, by the instrument creating the power, any estate whatever. But when power is given to a person who derives under the instrument creating the power, or otherwise, a present or future interest in the subject over which the power is to be exercised, it is then a power coupled with an interest: *Bergen v. Bennett*, 1 Cai. Cas. Err. 1 [2 Am. Dec. 281]. The case of *Hunt v. Rousmanier*, 8 Wheat. 174, and the opinion delivered by Marshall, C. J., furnish the clearest view and illustration of this subject. Rousmanier, the defendant's intestate, borrowed a sum of money of Hunt, for which he gave him two promissory notes, and executed a power of attorney, authorizing him to make and execute a bill of sale of three fourths of the brig *Nereus* to himself, with a proviso that the power was given for collateral security of the notes, and was to be void on their payment. Rousmanier died insolvent; and it became a question, whether, by his death, the preceding power was revoked.

The general principle was first laid down by Chief Justice Marshall, that, "as the power of one man to act for another depends on the will and license of that other, the power ceases when the will or permission is withdrawn." "But," he proceeded, "this general rule, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or if not so, is deemed irrevocable in law." He next remarks, that "if a power be coupled with an interest, it survives the person giving it, and may be executed after his death." As this proposition is laid down too positively in the books to be controverted, he inquires, "what is meant by the expression a power coupled with

an interest?" To this he replies by the inquiry, "Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power?" "We hold it," said he, "to be clear that the interest, which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. The words themselves would seem to import this meaning. A power coupled with an interest, is a power which accompanies, or is connected with, an interest."

The principle contained in this case is that to constitute a power, coupled with an interest, there must be an interest in the thing itself, and not merely in the execution of the power; and to this effect are all the cases cited by the plaintiff's counsel. *Walsh v. Whitcomb*, 2 Esp. 565, was a case where a deed of assignment was given, and a power of attorney to effectuate it. In *Raymond v. Squire*, 11 Johns. 47, there was what the court considered an assignment of the covenants in a deed, and a power of attorney to sue upon them. In *Jackson d. King et al. v. Burtis et al.*, 14 Johns. 391, executors who executed a deed were devisees, and had a direct interest in the sale. Their power was coupled with the interest they had as devisees. So, in *Jackson d. Henderson v. Davenport*, 18 Johns. 295, lands were granted, and coupled with this was a power of attorney to grant the lands again, if necessary. There is a class of cases to which reference was made in the argument in which it is decided that a power is not naked in the sense of Lord Coke's general rule, which is coupled with other trusts and duties that require the execution of the power to sell: Sugden on Powers, 141; *Lessee of Zebach et al. v. Smith et al.*, 3 Binn. 69 [5 Am. Dec. 352].

The cases of *Osgood et al. v. Franklin et al.*, 2 Johns. Ch. 1 [7 Am. Dec. 513]; and *Franklin et al. v. Osgood et al.*, 14 Johns. 527, illustrate the principles contained in the cases alluded to. In these cases it was determined that if executors who were empowered by last will to sell the real estate of the testator, are vested with a legal or equitable interest in the estate; or are charged with a trust, the execution of which depends on the sale, the power survives, and may be executed by one of them. But this class of decisions, unless the first attorneys of Mrs. Mansfield had a power coupled with an interest, are entirely inapplicable to the case before us. There is no ground of pretense that they were charged with a trust, the execution of which depended on

the exercise of the authority delegated to them. They must stand or fall by the interest they have, coupled with the powers, in the instrument of attorney. The subject of discussion came under the consideration of this court in *Peabody v. Harvey*, 4 Conn. 119 [10 Am. Dec. 103]. One Bushnell directed the defendant to collect a promissory note in his hands, and to pay it to his creditors. After this, Bushnell ordered the payment of the same money to one Hyde, which accordingly was made. The first direction the court determined was a naked power, uncoupled with interest. It was considered as a gratuitous power to collect and pay the money, and did not amount even to an equitable assignment of the property.

I come now to consider the power which the plaintiff claims to be irrevocable. As it is not pretended that before the execution of the power of attorney to Messrs. Ingersoll and Hitchcock, they had any interest in the estate confided to their care, they, of consequence, have it devolved on them to show that the instrument constituting them attorneys conferred on them an interest in the property, so that their power was coupled with an interest. On a construction of the instrument, according to the form of its expressions, and the object of the parties, I see no ground for this position. It professes to have been executed in consideration of a preceding indebtedness; but I am not aware that this gives any aid in its construction. A power without consideration is equally valid as with one; and the expression means no more than that the indebtedness was the inducement operating on Mrs. Mansfield in conferring the power in question. We must look to other parts of the instrument to ascertain whether it transferred any interest. On the clause empowering the attorneys to sue, prosecute and discharge, no stress has been or can be laid. They, however, were authorized to sell and convey the estate mentioned in the power, in the name of their principal. It has been established law from before the days of Sir Edward Coke to the present time, that a power to sell and convey is a naked power, and revocable: Co. Lit. 113 a, 112 b, 181 b; Perk. secs. 541, 542; Shep. Touch. 429; Pow. Dev. 292, 310; *Osgood et al. v. Franklin et al.*, 2 Johns. Ch. 19, 20 [7 Am. Dec. 513]; *Lancaster v. Thornton*, 2 Burr. 1027; *Franklin et al. v. Osgood et al.*, 14 Johns. 553.

The only remaining clause supposed to confer an interest, declares that "after paying themselves all dues to them, or either of them, or to Seth P. Staples, esq., and all expenses," the attorneys are to account for the residue. This expres-

sion has been supposed to show that the power created an interest in the estate, to which it related, in security of the indebtedness before mentioned; but I am of different opinion. The instrument contains no words of conveyance or of assignment; but is a simple power to sell, convey and account. The object of the expression last mentioned was not to transfer the property, or to give a lien upon it, but to impart the privilege of a set-off, if the estate should be sold, and the money collected; nor can it, with any propriety, be contended that the words express or imply any other meaning. The power in *Hunt v. Rousmanier*, before cited, which the court adjudged to be a naked power not coupled with an interest, admitted of a different construction with far more force than the one which the plaintiff has exhibited.

2. In this state, a power coupled with an interest is revocable, so far as relates to the prosecutions of suits in the name of a person who has given a letter of attorney. The law has long been settled by uniform practice and judicial determinations: *Coleman v. Wolcott*, 4 Day, 6; *Bulkley et al. v. Landon et al.*, 3 Conn. 76. In the case of an assigned note, there are both an assignment of interest and a power of attorney to sue; in other words, there is a power coupled with an interest. But notwithstanding this, it is a legal truth, familiar to every lawyer, that the assignor may withdraw the action commenced on such note, in his name, and that the right to do this is so common and well established as to be incapable of controversy. Had Mrs. Mansfield assigned for a valuable consideration, all her bonds and notes, the suits upon them she might withdraw, upon the unquestionable principle that in Connecticut all actions are supposed to be under the control of the party to the record: Swift's Dig. 437. What power to prosecute, more irrevocably, can be stated or imagined?

The plaintiff has adduced cases to show that in the court of common pleas, in Westminster Hall, and in the neighboring state of New York, a different rule prevails: *Leigh v. Leigh*, 1 Bos. & P. 447; *Andrews v. Beecker*, 1 Johns. Cas. 411; *Wardell v. Eden*, 2 Johns. Cas. 121, n (a); *Littlefield v. Storey*, 3 Id. 425; *Anderson et al. v. Van Alen*, 12 Id. 343, and that they will not permit any interposition in a suit by the assignor. This undoubtedly is good law in the courts which have given it their sanction; but here it is of no avail. We have a law of our own long established, and on mature deliberation, affirmed by this

court. By this law the determination of the superior court was both authorized and required.

LANMAN and DAGGETT, JJ., were of the same opinion.

PETERS, J., concurred in the result, being satisfied that a writ of error would not lie in this case. On the construction and effect of the power he expressed no opinion.

BRAINARD, J., was absent.

Judgment affirmed.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

BRECKENBRIDGE v. TODD.

[3 T. B. MONROE, 52.]

THE RECORD OF A DEED takes effect from the time it is filed for record, and not from the time it is in fact copied into the recorder's book.

THE DATE OF A DEED IS PRESUMED to be the time of its delivery.

A PRIOR DEED enrolled within the time allowed by law takes precedence over a subsequent deed first enrolled, both under the statute of this state and that of England.

EVIDENCE OF CONSIDERATION.—A mortgage is evidence of the consideration therein named, as against the mortgagor and those claiming under him.

ONUS OF PROVING TITLE.—When the plaintiff seeks the rescission of an exchange of lands, because, as he alleges, the defendant had no title, the onus of proving title is on the latter.

ERROR to the Jefferson circuit. Bill in chancery. The opinion states the case.

Barry and Littell, for the plaintiffs in error.

Denny, for the defendant.

By Court, **BOYLE, C. J.** Todd and Shreve entered into a contract for the exchange of their lands, and executed mutual deeds of conveyance therefore, each covenanting, among other things, that he was seised of the land conveyed by him, and that he had good right to sell, and that it was free from incumbrance, etc. Shortly afterwards, Todd discovered that, previous to the exchange, Shreve had executed to Overstreet a mortgage upon the land conveyed by Shreve to Todd, to secure eight thousand dollars, and, in consequence thereof, he obtained from Shreve a mortgage upon the land he had conveyed to Shreve, to indemnify him against the previous mortgage to Overstreet. The

mortgage from Shreve to Todd bears date the first of June, 1819, was acknowledged by Shreve on the first of September following, and on the second of that month by his wife, who relinquished her dower, and it was thereupon admitted to record in the proper office. On the tenth of June, 1819, Shreve executed a deed of trust upon the same, to secure Robert Breckenridge for certain responsibilities he had incurred for him, and on the twenty-seventh of July, 1819, Shreve executed a deed of trust upon the same land, to secure James Breckenridge against responsibilities he had incurred for Shreve. Both these deeds were acknowledged by Shreve on the nineteenth of August, 1819, in the proper office, and were acknowledged by the trustees on the eighteenth of March, 1820, and admitted to record.

On a bill afterwards filed by the Breckenridges, and without making Todd a party, the land was decreed to be sold under their deeds of trust, and on the sale they became the purchasers. Overstreet also filed his bill, to subject the land conveyed by Shreve to Todd, to be sold in satisfaction of the money for which it had been mortgaged to him. In this situation of things, Todd exhibited his bill, in which, after setting forth the foregoing state of facts, he alleges that Overstreet, from whom Shreve derives his right to the land he had conveyed to him, had no title, and that Shreve was insolvent. He makes Shreve, the Breckenridges, etc., defendants, prays for a rescission of the contract between him and Shreve, and for general relief. The Breckenridges answered, and alleged that the mortgage from Shreve to Todd was antedated, and insisted upon their right to be preferred to him. The bill was taken for confessed against the other defendants.

In the progress of the cause Todd had leave to take the deposition of Shreve, and the deposition was afterwards taken and read upon the hearing of the cause without objection. The circuit court decreed a rescission of the contract, and the Breckenridges have brought the case to this court by writ of error. By their assignment of errors they allege the decree is erroneous: "1. Because the deed of trust to the Breckenridges, although subsequent in date to Todd's mortgage, having been first recorded, was entitled to a preference over the mortgage; 2. There is no evidence in the record which shows Todd was entitled under his mortgage; and, 3. The deposition of Shreve was improperly admitted into the record." The position asserted in the first error assigned is one so obviously untenable that we should have hardly thought it necessary to be noticed had it not been insisted

on with apparent earnestness by respectable counsel. The deeds of trust from Shreve to the Breckenridges were not in fact recorded prior to the mortgage to Todd, but they were acknowledged by Shreve, and being lodged in the office to be recorded before the mortgage to Todd, must, according to the case of the *Bank of Kentucky v. Haggin*, 1 Marsh. 306, have the same effect as if they had in fact been at that time recorded.

But the mortgage to Todd bears date prior to either of the deeds of trust to the Breckenridges, and was acknowledged by Shreve, and recorded in the proper office in less than eight months from its date, the period within which the law then required it to be recorded to be valid against purchasers and creditors. The mortgage, without being recorded, would have been valid against Shreve, the grantor; and as the law only required it to be recorded within eight months from its sealing and delivery to be valid against purchasers and creditors, it evidently must be good against the Breckenridges, unless, as they allege in their answer, it was antedated. But of this allegation there is not the slightest proof in the cause, and in the absence of all proof to the contrary, a deed, though it takes effect not from its date, but from its delivery, is always presumed to have been delivered on the day it bears date. Thus, in *Shep. Touch.* 72, it is said: "All deeds do take effect from, and, therefore, have relation to, the time, not of their date, but of their delivery, and this is always presumed to be the time of their date, unless the contrary do appear." And the same doctrine is recognized by this court in the case of *McConnell v. Brown, etc.*, Litt. Sel. Cas. 459, and is sanctioned by the English decisions under their statute of enrollments.

The statute of enrollments in England required a deed of bargain and sale to be enrolled within six months, and if it were not enrolled in that time it became void; but where it was enrolled within the six months, it had relation to the time of its date, and passed the land *ab initio*, and therefore it was decided under that statute, that if the bargainor, after having sold to one, bargain and sell the land to another, and the second deed is first enrolled, and then the first deed is enrolled within six months, the second shall be void: *Com. Dig.*, tit. Bargain and Sale, B. 9. It is plain, therefore, that although the deeds of trust to the Breckenridges were recorded before the mortgage to Todd, yet as the latter was first executed, and was recorded in the time then prescribed by law, it must be preferred; and of course the position asserted in the first error assigned is wholly untenable.

The second error assigned advances a position no less untenable. The mortgage is of itself sufficient evidence of Todd's right under it. It conveys the legal title to him from Shreve; and as it is undoubtedly evidence against Shreve of Todd's right under it, it must be equally so, and to the same extent evidence of this right against the Breckenridges, who derived their claim by conveyances from Shreve subsequent to the mortgage. The mortgage would not, indeed, give a right to Todd to have a rescission of the contract of exchange between him and Shreve. The proper decree to enforce the mortgage would have been a foreclosure of the right of redemption, and a sale of the premises mortgaged. But in this respect the propriety of the decree is not questioned by the assignment of error; and if it had been, we should have thought the decree of rescission might be sustained, not alone upon the ground of Todd's right derived under the mortgage, but upon that coupled with the fact that Shreve has shown no title to the land conveyed in exchange by him to Todd. That Overstreet, from whom Shreve purchased, had no title, is alleged in the bill; and as no title is shown, the allegation must be taken to be true; for it is a negative, and from the rules of evidence the *onus probandi* must necessarily devolve upon those whose interest it was to maintain the affirmative.

Assuming the fact to be that Shreve had no title to the land conveyed by him in exchange to Todd, it would have been, from the nature of the contract, a sufficient ground for a rescission of the contract as against Shreve; as against the Breckenridges, it might not be so without the aid of the mortgage; for without the mortgage, the Breckenridges would, by their deeds of trust, have acquired the legal title to the land which Todd had conveyed to Shreve, and as Todd would only have had in that case an equity, which, though coeval with the contract of exchange, and therefore prior to the equity of the Breckenridges, derived under their deeds of trust, could not have prevailed against their equity, combined with their legal title. But the mortgage from Shreve to Todd, vested in him the legal title, and his equity being prior to that of the Breckenridges, he had a right as against them, to the relief decreed by the circuit court. These observations, however, as to the mode of relief granted by that court, are superfluous, for we do not understand the assignment of error to question the mode of relief, but only the right of Todd under the mortgage, and of that there can be no doubt.

The third error assigned is at least as untenable as either of the former. In the first place, it is apparent, from what we have already said, that the deposition of Shreve is not material to the right of Todd, the decree being sustainable upon grounds not depending upon his testimony. In the next place, it is well settled that, as no objection was made to reading this deposition in the court below, the propriety of reading it can not be questioned in this court.

The decree must be affirmed, with costs.

GOODWIN v. BLAKE.

[8 T. B. MONROE, 106.]

A NOTE GIVEN to one of several creditors, in consideration of his having signed a composition deed with the other creditors, whereby the debtor was released from all demands, is, when made without the knowledge of the other creditors, invalid.

ERROR to the Jefferson circuit. Action on a promissory note. The opinion states the case.

Bibb, for the plaintiff.

Chinn, for the defendants.

By Court **OWSLEY, J.** Prior to 1811, Goodwin and Whiting were engaged in partnership as merchants, and contracted debts to an amount beyond their means of payment. In that year, Whiting died, and Goodwin, desirous of closing the business of the firm, proposed to the creditors to assign to trustees all the estate, property and effects, which belonged either to him individually, or to the firm of Goodwin & Whiting, provided the creditors would release him from the debts due them. The creditors, among whom were Brigham and Bigelow, acceded to the proposition of Goodwin, and on the fifteenth of June, 1811, the creditors and Goodwin executed an indenture, by which it was agreed that Goodwin should, within three months thereafter, make an assignment of all the goods, property, estate and effects of the said firm of Goodwin & Whiting, and all the estate, property and effects of Goodwin for the benefit of said creditors; and by said indenture the creditors appointed Rufus Ellis, to whom the assignment was to be made.

It was by said indenture further agreed, that upon Goodwin's making the assignment to Ellis as aforesaid, the said creditors would release and discharge Goodwin from all debts and

demands whatsoever; that in pursuance of said agreement, Goodwin afterward, and within the three months, did actually, by good and sufficient deed, make an assignment of all the estate, goods, property and effects belonging either to himself or the firm of Goodwin & Whiting to Ellis, according to the true intent and meaning of the indenture; and that under regular authority from the creditors, Ellis not only received the assignment, but also the estate, property, goods and effects thereby transferred. Prior, however, to the execution of the indenture by Goodwin and the creditors, Brigham and Bigelow privately requested Goodwin to execute to them a note for one thousand five hundred dollars, part of the demand for three thousand four hundred dollars, which they held upon the firm of Goodwin & Whiting, and refused to sign the indenture, unless he would agree to execute such a note, payable within two years. To obtain their signature to the indenture, Goodwin privately promised to execute the note, and afterwards, viz., on the fifth of November, executed to Brigham and Bigelow the note for one thousand five hundred dollars. The agreement so made between Goodwin and Brigham and Bigelow, was altogether unknown to the other creditors, and was executed on no other consideration than as aforesaid. The estate, goods, property and effects were of great value, but not sufficient to pay the amount of debts owing by the firm of Goodwin & Whiting. The one thousand five hundred dollar note which was executed by Goodwin was afterwards assigned by Brigham and Bigelow to Blake, and by Blake suit was brought thereon in the circuit court against Goodwin.

Under a state of pleading which allowed Goodwin to avail himself of any and every legal defense, the parties agreed to submit the law and facts to the determination of the court. Evidence going to establish the preceding facts was offered by Goodwin, but was rejected by the court; and judgment was rendered in favor of Blake for the amount of the note, with interest, etc. In rejecting the evidence, the court appears to have gone upon the idea that if true it constituted no legal bar to the right of Blake to recover upon the note. We shall, therefore, in revising the judgment of that court, confine our inquiries to the question, whether or not, conceding the facts to be true, Goodwin, in point of law, is bound for the amount of the note.

If, at the time Goodwin promised to execute the note, he had in fact then given the one upon which the action of Blake is

founded, and not delayed the execution thereof until after the deed of composition was made by the creditors, there could not be a reasonable doubt but what the note would have imposed no legal objection upon Goodwin. The note would in that case have been executed by Goodwin to his creditors, Brigham and Bigelow, without the privity of the rest, after an agreement by all to take an assignment of property not sufficient to satisfy the whole of their demands, and to release their claims to secure Brigham and Bigelow the residue of their demand, and in legal contemplation would be fraudulent as to the other creditors, and in judgment of law illegal and invalid. But it was not until after the deed of composition was executed by the creditors, that the note was given by Goodwin to Brigham and Bigelow, and as it is not for a greater sum than remained unpaid them after the property assigned by Goodwin in trust for the use of his creditors was disposed of, the question of Goodwin's liability under the note must turn upon different principles. For it is impossible that after a composition between creditors, any contract subsequently entered into by one of the creditors, though made without the privity of the others, can be so construed as to be a fraud upon the others.

The note can not, therefore, be adjudged invalid in consequence of its being executed in fraud of the other creditors of Goodwin. But though not fraudulent as to others, we apprehend, in consequence of the insufficiency of the consideration upon which it was given, there can be no recovery against Goodwin. In consequence of the assignment which Goodwin agreed to make of the property, Brigham and Bigelow undertook to release him from their debt, and after covenanting to do so, it might well be questioned whether the residue of their debt, which the property assigned was insufficient to pay, could form such a consideration as to uphold a subsequent promise to pay. But were such a consideration even admitted to be sufficient, when it is recollected that the note was executed in pursuance of a promise privily made with part of the creditors, to induce them to sign the deed of composition, we apprehend the consideration must be contaminated with the fraud produced on others by the promise, and as such insufficient to uphold the note as a valid obligation. The court below should, therefore, have admitted the evidence.

The judgment must, consequently, be reversed, with cost, the cause remanded to the court below, and a new trial there had,

with directions to that court to admit the evidence which was offered by Goodwin, and such further proceedings there had as may not be inconsistent with this opinion.

In *Wiggin v. Bush*, 7 Am. Dec. 324, a note given by an insolvent debtor to a creditor, in consideration that the latter should withdraw his opposition to the debtor's discharge, was held void.

FITZHUGH v. BANK OF SHEPHERDSVILLE.

[3 T. B. MONROE, 126.]

LIEN OF BANK ON ITS STOCK.—A corporation which issues a certificate of stock, stating on its face that it is transferable, has not a lien on such stock as against a purchaser thereof. The purchaser may therefore compel the transfer of such stock to him on the books of the corporation. A CORPORATE SEAL is not essential to the validity of a certificate of stock.

APPEAL from the Bullitt circuit. Bill in chancery. The opinion states the case.

Bibb and Haggin, for appellant.

Crittenden, for defendants.

By Court, MILLS, J. Fitzhugh, the complainant below, and now appellant, indorsed a bill of exchange to the Bank of the United States, drawn by Thomas Q. & Henry H. Roberts. The bill was protested, and on notice thereof, Fitzhugh discharged and took up the bill, and applied to the drawers for the amount, who gave him therefor forty-five shares of stock in the bank of Shepherdsville, on which they had paid three installments, amounting to two thousand seven hundred dollars, about the same he had paid for the bill. Thomas Q. & H. H. Roberts held the scrip of the bank for said shares, or a certificate of the numbers and amount, stating on its face that the stock was transferable only at bank, personally or by attorney. They accordingly gave to the appellant a letter of attorney to the cashier of the bank, authorizing him to make the transfer; and on making application to the cashier to make the transfer, he refused to do so. He next applied to the Messrs. Roberts, and they gave him a writing confirming their first transfer, and conveying the stock to him, and appointing another agent to apply for them and get the transfer made. But on the second application the officers of the bank still refused to permit the transfer to be made.

The appellant then brought this bill against the bank and

the Messrs. Roberts, to compel an assignment of the stock to him, and to compel the bank to account to him for the dividends after the transfer. The bank answered, admitting the facts, and alleging as the only reason why the transfer was not made, that the Messrs. Roberts were then indebted to the bank a sum of money due by notes indorsed, and it was understood, they say, when the accommodation was made, the stock was a pledge, although there was no writing to that effect. The question is, which has the preference? Can the bank retain the stock as a security to them against the transfer made to the appellant? The court below decided this question in favor of the bank, and dismissed the bill as to the bank, but gave a decree against the Messrs. Roberts for the amount. This decree is questioned by this appeal.

We cannot find either in the answer of the bank or in the proof a special pledge of this stock. It is proved that the bank was then in the habit of lending to the stockholders only, and that to the amount of their stock; and the stockholders in this instance, when they got their last accommodation, made use of their stock as an inducement to the accommodation. But the bank required and obtained indorsers then supposed to be good, and after the last accommodation issued their scrip, specifying on its face that the stock was negotiable. At the time the stock was sold to the complainant, the debts due from the firm of Thomas Q. & H. H. Roberts had not become payable, and they had been in no default when the demand of a transfer was made at the bank. Afterwards they failed, and their paper was protested, and actions were brought on both their notes, against them and their indorsers. In one of these actions judgment was obtained against the whole, and an ineffectual execution against all but one indorser, as to whom no execution has been prosecuted, and there is no proof of insolvency as to him.

In the other case, which is the principal demand at the trial, the cause was dismissed without prejudice against the indorsers, who questioned by their plea the diligence of the bank, and no judgment or execution has been had against them, although there is proof rendering it probable that an execution would be ineffectual as to them also, owing to their insolvency. It is proved that in other cases, when the bank loaned on the credit of the stock only it had taken written pledges, and that it had admitted a transfer of stock when the stockholders were indebted without hesitation, and a short time before this trans-

action arose, the bank had admitted a transfer of part of the stock in question to the firm of Thomas Q. & H. H. Roberts, by a debtor to a considerable amount. The controversy brings itself then to this point: Had the bank a general lien by law on the stock held in the institution by their debtors, notwithstanding they had issued their scrip, declaring the existence of the stock, and its negotiability.

It is true, the bank had possession of this stock, and possession oftentimes carries with it a lien to indemnify for debts contracted on the credit of the thing possessed. Such is the case decided at the present term, in *Bard etc. v. Stuart*; still, however, we apprehend the possession of the bank in this instance can give it no lien. It had no express pledge of the stock, and all the lien contended for is that which the law may infer from the circumstances. No such inference can be drawn. Bank stock is an article of commerce; and the certificate of shares is not only the evidence of title, but the evidence of the negotiability of the stock, and must be taken as conclusive evidence against the bank that the stock is salable and free of incumbrance. If the bank wishes to avail itself of such a pledge it must take from the holder this evidence of title and transferable quality, and show an express pledge. Otherwise the holder of such evidence might delude and impose upon purchasers, and the bank stand as a tacit accomplice in that delusion, and then be permitted to take from an innocent purchaser the title thus acquired.

We attach no importance to the want of a seal of the corporation to this scrip. Whether sealed or not, its terms equally invited purchasers to take it, and the appellant having done so he is entitled to a clear preference over the bank. The court below ought, therefore, to have decreed the transfer of the stock to the appellant, and to have directed an account of the dividends to be taken, and to have rendered a decree therefor against the bank; and if this had proved inadequate to discharge the demand of the complainant, to have rendered a decree for the residue against Thomas Q. & H. H. Roberts.

The decree must be reversed with costs, and the cause be remanded for such a decree, and proceedings to be there had as shall accord with this opinion.

On the question as to whether a corporation has a lien on its stock or not, see *Morgan v. Bank of N. A.*, 11 Am. Dec. 575, and note thereto, 581. In *Mott v. Hicks*, 13 Id. 550, it was decided that contracts not under corporate seal may be binding; see, also, note to that case, and authorities cited.

McALEXANDER v. WRIGHT.

[3 T. B. MONROE, 189.]

THE ASSIGNMENT OF ERROR.—That the court erred in denying the motion for a new trial, brings before this court every question which was properly before the lower court on that motion.

ERROR IN NOT DISMISSING AN ACTION on application made before the trial, because the attorney had no authority to prosecute it, may be reviewed on motion for a new trial.

AN ATTORNEY HAS NO POWER TO APPEAR and act by virtue of his license alone. He must be employed by the party for whom he appears, or by some one authorized to represent such party.

WARRANTS OF ATTORNEY were formerly given in open court. Afterwards a writing *en pais*, or even a parol authority became sufficient. The law exacting such warrants is not obsolete, though their production is rarely required.

LACK OF WARRANT OF ATTORNEY, in the record, was formerly cause for the reversal of the judgment.

QUESTIONING AUTHORITY TO BRING AN ACTION.—A party may require the attorney of his adversary to produce his warrant of attorney, by showing that his rights will otherwise be jeopardized, and himself brought into litigation, without the consent of the man who stands on the record as his adversary. The authority of an attorney should not be capriciously demanded; and, if so demanded, the court will not order it to be produced.

ERROR to the Madison Circuit. Debt. The opinion states the case.

Caperton, for the plaintiff.

Turner, for the defendant.

By Court, **MILLS, J.** This action was brought in the name of the present defendant in error, who declared in debt on a judgment rendered in the state of Virginia. The defendant below, now plaintiff, appeared, and on filing an affidavit, procured a rule on the counsel of the plaintiff below, to show by what authority, and by whose procurement, he prosecuted this suit. In the affidavit he stated that James Wright, the then plaintiff, had long since left Virginia, and gone to Florida, or some of the then Spanish dominions, and had never been heard of since, and that from this and other circumstances, he believed him to be dead; and that he verily believed that he, said Wright, had given no authority to prosecute this suit to any person; and that the person who pretended to have an assignment of the judgment, and for whose use this suit was prosecuted had no title thereto, and if compelled to pay the money now he would be in danger of being compelled to repay it to James Wright or his representatives.

On the return of this rule, the counsel for the then plaintiff produced his license to practice law in the courts of the commonwealth, and evidence of his admission to practice in that court, admitted that he had not obtained a warrant of attorney when employed in this case or any other during several years practice, and averred that it was not customary to do so by practitioners of law in this state; and insisted that his license gave him complete authority to appear in any case, without his right to commence or prosecute the suit being questioned in court at the instance of the opposite party. The court below sustained the cause shown as good, and discharged the rule. A judgment on *nil dicit* was then rendered, and a writ of inquiry prosecuted, and judgment rendered for the plaintiff below. The defendant then moved that the execution of the writ of inquiry should be set aside, and a new trial granted, and among other things, relied in that motion on the supposed error in the court, in not sustaining the rule to produce a warrant of attorney, and in allowing the counsel for plaintiff below to proceed without showing any authority to do so from the owner of the judgment sued on. The court overruled this motion; the defendant below excepted, spreading all this matter on record, and has prosecuted this writ of error.

It is now insisted by the defendant in error that the errors assigned do not reach the question made on the rule to produce authority to prosecute the suit. We think differently. It is assigned for error that the court below erred in not granting a new trial, and this point was pressed on the motion for a new trial. If the court erred in refusing to require authority to proceed in the suit, and in permitting the plaintiff's counsel to proceed until that was done, it was competent for the defendant below, with leave of the court, to ask a reconsideration of this question as a reason why the verdict should not stand, and to bring the counsel for the plaintiff below back to the same point, by a review of that question; and it was competent for the court to correct its own errors by bringing the plaintiff back to the point where his course ought to have been arrested. It follows, therefore, that the assignment of error questioning the decision of that court in not granting a new trial, does bring in question every point on which the defendant below might properly rely on that motion.

The question then presents itself, was the rule properly granted, and did the court err in discharging the rule to produce authority to progress with the suit on the production of

the general license of the attorney prosecuting? It has been here insisted that no warrant of attorney in this state is necessary, and that the license of the attorney, and the law under which it was granted, supplies everything necessary, and furnishes the attorney with full authority to proceed without question, everywhere and at all times. To this doctrine we cannot subscribe. The acts of assembly directing how licenses shall be granted to attorneys and counsel at law, and the license granted in pursuance thereof, do authorize the attorney to appear and act for every party who may employ him to do so; but not to appear for every party, whether employed or not, or to appear for any party on the employment and at the instance of a stranger, who may have no interest in the cause, either legal or equitable. The right to be employed and appear is one thing; this is proved by the license, and the law under which it was granted. The fact of being actually employed is another matter, and is proved by the warrant of attorney. In England, from which our jurisprudence is derived, attorneys must have a general license and an admission in court; yet the warrant of attorney could not be dispensed with in cases where it was properly demanded. And the general license was not intended to reach further in this country.

This license formerly was required to be by letters patent from the crown, but afterwards, the license and admission of attorneys and counsel became a subject of statutory regulation, as it is here; but through these changes, the special warrant of attorney was held necessary down to our separation from that government: Tidd's Pr. 34-64. This warrant of attorney originally must be given in court, or rather, a party in open court must appoint his attorney, and in process of time, it was done by writing *en pais*, and even a warrant by parol has there been held good. To regulate these warrants, statutes were enacted, some of which were in force in this country, and have continued so since our separation, and are retained in our code: 1 Dig. L. K. 125, 126. It has been urged that these laws are obsolete, and the long disuse of the practice of warrants of attorney, both in Virginia and this state, and, indeed, in other states of the Union, has been urged as a reason why these statutes, or the provisions of the common law, are not in force in this country, or are become obsolete. We admit that such warrants have been seldom used for a great length of time, and our adjudged cases are silent on the subject.

This silence is loud testimony in favor of the integrity of the

profession, for when the abuses are considered which might arise without, and which are intended to be restrained by, warrants of attorney, the necessity of them must have been superseded more by the correct practice of the profession than by any other cause. Attorneys and counsel might often use the securities of others which fall into their hands, and use their names in actions, without their consent, for fraudulent purposes; and especially the judgments of others, of which any person may obtain copies who pays for them at the clerks' offices, might often be put in suit, and money coerced by them, without leave of their owners. These and similar practices have not been followed by practitioners, and hence warrants of attorney have been seldom demanded. But the possibility that such practices may grow up shows the wisdom of the law in restraining them by warrants of attorney, and we do not feel ourselves at liberty to dispense with them. We can not say that either the provisions of the common law or these statutes are not in force, for we find no repeal. Nor can we say that they are obsolete while the reason for their existence remains; and, indeed, our own statutory code supposes them in force by expressly naming the warrant of attorney, and providing for cases where the want of it shall not reverse the judgment: 2 Dig. L. K. 681, 2. If the law on this subject is still in force, as we have supposed, it presents the question whether in this case the warrant of attorney was rightfully demanded, and ought to have been shown at the instance of the opposite party.

As between the attorney and his client, it is evidently necessary that some kind of warrant should exist. For when it is considered that a party plaintiff or defendant is bound by the judgment and, if against him or for him, it is conclusive evidence thereafter, the necessity is evident to preclude his rights from jeopardy, without his consent, by the existence of a warrant of attorney. It was on this principle that the lack of a warrant of attorney in the record was even held sufficient to reverse it. It was because it did not appear that the party whose warrant was absent was privy to the suit, or had consented to its prosecution. The practice, however, under our statutes, which forbids a reversal for the lack of the warrant proves that this was carrying the caution too far; but the existence of a fear on that subject, shows how tender the law was of individual rights, and that it had provided against their being concluded without the consent of the party. In this case, however, the warrant is demanded by the opposite party, and he ought to

show that his rights were jeopardized without it, or that he was disturbed by being brought into litigation without the consent of the man who stood on the record as his adversary. This, we think, his affidavit has done. He shows a probability of Wright's death, and if that is true, and the money should now be collected in his name, the recovery would be no bar to his representatives. He has shown strong circumstances that Wright had no hand in this suit, and he hereafter might be in danger of another contest with Wright for the same demand, because Wright had nothing to do with this controversy. In such case the counsel for plaintiff was bound to show some right in those for whose benefit the suit was brought, either legal or equitable.

The suit seems to have been prosecuted for the use of another, and there are assignments on the transcript of the record of the judgment filed. But no assignment thereof appears by Wright to the plaintiff, or any authority from him. The only assignment which is pretended to pass his title, is made by John Wright, who styles himself the administrator of Robert Wright, now deceased, who was the attorney in fact of James Wright, the plaintiff. Now the idea that the administrator of an attorney in fact can pass by assignment the securities of the principal of his intestate, is so absurd that it furnishes a suspicion that there has been an improper attempt to take hold of and use this Virginia judgment without the consent of its owner, and imposes upon the attorney for the plaintiff, or those who are suing on the record, the necessity of exhibiting some further evidence of title, derived from the plaintiff, before he can be permitted to proceed with his suit, and of course the court below, on the evidence adduced on showing cause against the rule, erred in discharging that rule.

We would not be understood as imposing upon the profession hardships in their management of causes, or as deciding that they were bound to gratify the party to which they were opposed with a sight of their authority on every capricious demand; but that when reasons are shown why the interest of the adverse party is jeopardized by prosecuting suits without the leave or consent from the real owner of the demand, their authority ought to be shown.

One other point made as grounds for a new trial, as the cause may progress on its return to the court below, will be noticed. It is insisted that the verdict is for too much. The judgment for the debt is for one hundred and ten dollars, which is the pre-

cise amount of the debt mentioned in the foreign record, omitting ten dollars and seventy-two cents recited in the declaration as the costs awarded in Virginia. In this respect the debt recovered is made less than the debt demanded. For we view the costs which were awarded in Virginia, as part of the judgment there, and of course part of the debt which is demanded here. But the damages awarded by the jury in this action are more than the amount of interest at the rate given in evidence to the jury. This increase is suggested to have arisen by adding in the costs in Virginia. This was placing these costs as part of the damages, when they ought to have been part of the debt. But as the defendant was subjected to no more by this transposition of the costs than he would have been had they been placed in their proper place, the exception ought not to be held sufficient to reverse the judgment.

But on the other point the judgment must be reversed with costs, and the cause be remanded, with directions to re-try the rule to produce authority to prosecute the suit, and if none is produced, or sufficient cause is not shown, to dismiss the suit accordingly.

PRESUMPTION IN FAVOR OF AUTHORITY OF ATTORNEY WHO APPEARS IN A CAUSE.—In the United States courts, and in the courts of all the states, the mere appearance of a regularly admitted attorney is presumptive evidence of his authority to represent the person for whom he appears. Marshall, C. J., in *Osborn v. The U. S. Bank*, 9 Wheat. 738, says: "Certain gentlemen, first licensed by government, are admitted, by order of court, to stand at the bar with a general capacity to represent all suitors. The appearance of any one of these gentlemen in a cause has always been received as evidence of his authority; and no additional evidence, so far as we are informed, has ever been required. This practice, we believe, has existed from the first establishment of our courts, and no departure from it has been made in those of any state, or of the Union." And the same rule applies whether the attorney appears for a natural person or for a corporation. "Formerly attorneys were required to be appointed by warrant and to file their powers in court, but that practice has long since been disused, and a mere parol retainer is sufficient. And when an action is commenced by a regular, responsible attorney, the presumption is, that it is done by due authority of the plaintiff. It is not necessary to show authority, whether the suit be by an individual or a corporation, in order to the progress of the suit, unless it is called for by the defendant. Even when called for, the declaration by the attorney that he was employed by the plaintiff or his agent, who, he believed, was duly authorized to employ him, will ordinarily be deemed sufficient:" *Manchester Bank v. Fellows*, 28 N. H. 302; *Bridgton v. Bennett*, 23 Me. 420; *Penobscot Boom Corporation v. Lamson*, 16 Id. 224; *Field v. Proprietors*, 1 Cush. 11; *Jackson v. Stewart*, 6 Johns. 34; *Gaul v. Groat*, 1 Cow. 113; *Succession of Patrick*, 20 La. An. 204; *Tally v. Reynolds*, 1 Ark. 99; *Leslie v. Fischer*, 62 Ill. 113; *Rogers v. Park*, 4 Humph. 480; *Hardin v. Ho-Yo-Po-Nubby's Lessee*, 27 Miss. 567. In the case last cited the court say: "An attorney is an officer

of court, and responsible to the court for the propriety of his professional conduct, and the proper use of the privileges he has as such. No warrant of attorney is required by our laws or practice to enable him to appear for, and to represent a party in court. He is permitted, by almost universal practice in this country, to do so under verbal retainer, and it is only in cases of clear want of authority, or abuse of his privilege, that he is held to be incompetent to institute a suit or to represent a party in court. The presumption is in favor of his authority, and though he may be required to show it, yet if he acts in good faith, and the want of authority is not manifest, he will not be held to have acted without authority, because it is not shown according to strictly legal rules. If this were not so, the greatest inconvenience in practice would continually occur, both to clients and attorneys; for suits are frequently instituted by attorneys under the authority of letters from their clients, who are strangers and whose handwriting is unknown to them, and could not be proved without great trouble and delay. If required, in such a case, to produce his authority, the production of the letter, though he might be unable to prove the handwriting, would be sufficient; and so of a letter written by a party purporting to be the agent of the plaintiff. All that is required to be shown in such cases, in the first instance, is that the attorney has acted in good faith, and under an authority appearing to be genuine, though informal. It then devolves upon the party impeaching the authority to show by positive proof, that it is invalid and insufficient in substance."

ATTORNEY'S AUTHORITY TO APPEAR MAY BE INQUIRED INTO.—In discussing this question, in *Clark v. Willett*, 35 Cal. 534, the court say: "Upon such a question we have no doubt as to the power. Attorneys are the officers of the court, and answerable to it for the proper performance of their professional duties. They appear and participate in its proceedings only by license of the court, and if they undertake to appear without authority from the party whom they profess to represent, the act is an abuse of the license of the court, which, upon the application of the supposed client, the court has the power to inquire into and correct summarily. Otherwise, the very fountain of justice might become polluted, and a license to stir its waters become a license to defile them." It was held, in *Ex parte Gillespie*, 3 Yerg. 325, that "an authority to appear is indispensable in every court, if there be a call made for the authority." But the great weight of authority is decidedly in favor of a considerable modification of the doctrine laid down in this case. And it is generally held that the party questioning the authority of an attorney to appear, must show some good cause for so doing; as that the attorney was proceeding without authority for the mere purpose of oppression, or for some other sinister purpose: *Allen v. Green*, 1 Bailey (S. C.), 448; or that there is fraud, accident or mistake in the appearance: *McKierman v. Patrick*, 4 How. (Miss.) 333; *Tally v. Reynolds*, 1 Ark. 99; *West v. Houston*, 3 Harrington (Del.), 15. In the last case Bayard, C. J., says: "In our practice, therefore, the court would expect some ground to be laid, by affidavit or otherwise, before they would at the instance of the defendants require the plaintiff's attorney to produce a written warrant or other proof of his authority. Doubtless, where fraud was suggested, and especially if a minor was concerned, and in danger of being injured by an unauthorized proceeding before us, we would, for the protection of either guardian, ward or defendant, inquire into the attorney's authority; and would, if the case required it, apply other remedy than by merely striking off the suit." He must state facts showing or tending to show that the attorney does not possess the authority which he is attempting to exercise: *People v. Mariposa Co.*, 39 Cal. 683; *Leslie v. Fischer*, 62 Ill. 118; *Ninety-nine Plaintiffs v. Vanderbilt*, 4 Duer, 632; *Hamilton v.*

Wright, 37 N. Y. 502. The facts must be shown by affidavit: *Dockham v. Potter*, 27 La. An. 73; *Dangerfield v. Thruston*, 8 Mart. N. S. 232. And the burden of proof is upon the party denying the authority: *Thomas v. Steele*, 22 Iowa, 207; the authority of an attorney who has appeared cannot be impugned by a mere suggestion: *Campbell v. Arcenauz*, 4 La. An. 558.

WHERE AND HOW QUESTION OF AUTHORITY MUST BE DETERMINED.—If the authority of the attorney is not objected to in the lower court it cannot be questioned in the supreme court: *The State v. Carothers*, 1 G. Greene, 464. In *Harris v. Galbraith*, 43 Ill. 309, the court seemed to be of the opinion that the unauthorized appearance of an attorney could not be successfully urged as a ground for relief in equity; and that the remedy of the injured party must be sought by application to the court which pronounced the judgment. This point was not, however, essential to the determination of the case nor was it argued by the counsel. In some of the states relief against a judgment can not, in any case, be obtained by a suit in equity while the complainant's remedy by motion in the original action still exists: *Freeman on Judgments*, sec. 497. Where this rule prevails a party filing a bill in equity to vacate a judgment on the ground of the unauthorized appearance of an attorney, might be denied relief if it appeared that he could obtain full justice by a motion in the original action. But generally equity will not hesitate to assume and exercise jurisdiction for the protection of any person against whom a judgment has been entered without his fault, on account of the unauthorized entry of his appearance by an attorney: *De Louis v. Meek*, 2 G. Greene, 55; *Harshey v. Blackmarr*, 20 Iowa, 161; *Bryant v. Williams*, 21 Id. 329; *Ridge v. Alter*, 14 La. An. 866; *Shelton v. Triffin*, 6 How. U. S. 163; *Marvil v. Manowrier*, 14 La. An. 3; *Weeks on Attorneys*, sec. 202; *Freeman on Judgments*, sec. 499; 5 Am. Law. Reg. N. S. 387. Whether one who assumed to act as attorney was unauthorized to do so or not, is a question of fact for the jury: *Alsbaugh v. Jones*, 64 N. C. 29. And where suit is brought on a record which shows that service was not made on the defendant, but which showed also that an appearance was made for him by an attorney of the court, it is not allowable to prove, under a plea of *nul tiel record*, that the attorney had no authority; his want of authority can only be proved on a special plea, or on such plea as, under systems which do not follow the common law system of pleading, is the equivalent of such plea: *Hill v. Mendenhall*, 21 Wall. 453.

WHAT PROOF WILL SUSTAIN AUTHORITY WHEN IMPUGNED.—Where an attorney, who was ruled to produce his authority, filed an affidavit of plaintiff's agent, which stated that he was directed to cause suit to be brought, and that he employed said attorney, the showing was held sufficient: *Hughes v. Osborn*, 42 Ind. 450. So where the attorney answered on oath that he had received a letter from a distant city from persons whom he believed to be attorneys, instructing him to sue on the note, the court held that "the authority shown by the attorney, in the absence of anything to throw suspicion on its good faith, was sufficient to justify the court in permitting the attorney to prosecute the suit:" *Savery v. Savery*, 8 Iowa, 217. In *Bush v. Miller*, 13 Barb. 481, the handwriting of the client was allowed to be proved presumptively by means of several letters written in the same hand, dated at the same place and received by mail, instructing the attorney to take such steps, legal or otherwise, as he might deem necessary. And in Wisconsin, where a statute required that an attorney commencing an action to recover specific real property must have written authority, it was held that if such attorney had such authority from the agent of the plaintiff, he did not have to show that such agent had written authority from his principal: *Grignon v. Schmitz*, 18 Wis. 620.

TERRY v. BLEIGHT.

[3 T. B. MONROE, 270.]

TO MAINTAIN A TAX SALE all the requisites of the law must be shown to have been complied with.

DECISIONS OF SUPREME COURT OF UNITED STATES, giving effect and interpretation to a law of the United States will be followed in the state courts.

PRESUMPTION THAT OFFICER DID HIS DUTY will be indulged in to support sales under state revenue laws, until the contrary is shown.

JUDGMENT MUST BE PRODUCED to support a title based on a sale under execution.

ERROR IN DISMISSING A CROSS-BILL can not be reviewed on an appeal from a decree dismissing the original bill.

APPEAL from the Hardin circuit. Bill in chancery for the rescission of contract. The opinion states the case.

Hardin, for appellant.

Darby, for appellees.

By Court, **MILLS, J.** This is a bill in chancery, filed by Terry against Bleight and his assignees, to rescind a contract for the sale of two hundred acres of land to the former by the latter. Bleight had executed his bond for the conveyance by a quitclaim deed when the last payment of the purchase-money was paid, and Terry had given his promissory notes for several installments, some of which Bleight had assigned away, and the assignees sued Terry and recovered judgments, which were enjoined by the bill. The defendants all answered, and made their answers operate as cross-bills against each other. The grounds of equity set up to rescind the contract, are, that the claim of Bleight, which he had sold and stipulated to convey, had been after his sale to the complainant, twice sold for the direct taxes due to the United States, and once by the sheriff, under an execution against Bleight for costs. Bleight in his answer admits that he is informed that such sales had taken place, but has no personal knowledge of either; he contests the legality of all of them, and particularly charges that the sale under execution was fraudulent, and by collusion between the sheriff, the plaintiff in the execution, and the purchaser, and requires strict proof of everything which is to affect his interest. On final hearing, the court below dissolved the injunction, with damages, and dismissed the bill with costs, to reverse which the plaintiff below has prosecuted this appeal.

As to the sales for direct taxes, there is no evidence filed in

the cause, whereby it can be seen whether they were duly and properly made. The supreme court of the United States have held such sales to great strictness. The *onus probandi* lies on him who relies on them. Nothing is presumed in favor of the organs of the law, who have conducted them; but to sustain them, it must be shown that all the requisites of the law have been complied with, or the sale passes no title. Whether this rigid treatment of such sales can be maintained on principle, we need not now inquire; for it is adopted by the judiciary of the United States, in giving effect and operation to the laws of that government, and we do not feel disposed to give to the acts of congress, and the sales made in pursuance thereof, a greater effect than the functionaries of the nation have done, and thus drive our citizens into the federal court to be relieved from sales held void by those courts, but sustained in our own.

In giving effect to sales made by operation of the laws of this state, this court has adopted a different rule. In the case of the sales of land under execution, and for taxes, we presume the law has been complied with by the executive officers until the contrary appears; but these cases can not form a precedent for construing an act of congress, and effectuating a sale made in pursuance thereof, which has already been construed and settled by the judicial tribunals of the government which has adopted the law. As the complainant, therefore, in this case, has not produced the official evidence of the sales for taxes, and has not shown that one requisite has been complied with in making these sales, we can not sustain them as of any validity, or admit that the fact of their existence can be of any aid to him in getting clear of a contract for the same land.

The sale under execution only remains. He has produced a conveyance from the sheriff, and an execution under which the sale purports to have been made, but has produced no judgment. As the acts of this state, permitting lands to be sold for the payment of debts, only tolerates the sales to be made in satisfaction of judgments, the judgment is a necessary muniment of the title, and it has always been held by this court, that the production of the judgment is indispensable. The court therefore did not err in refusing the complainant below any relief. Bleight, in his answer in the nature of a cross-bill, made the complainant a defendant, and set up two other notes held for the last installments, and prayed a decree for that amount, and that it might be charged on the land, and the land be sold in satisfaction, in pursuance of the lien which he held as vendor,

without any other security. This cross-bill was dismissed by the court below, and it has been suggested by the counsel for Bleight, that this is a remaining question in the cause to be decided by this court. It must have escaped the attention of the counsel, that Bleight has not appealed, or prosecuted any writ of error, or made any assignment of errors complaining of any injustice done him by this decision. And while he does not complain, we ought not to consider the merits of the decree, dismissing the complaint in his answer in the nature of a cross-bill.

The decree of the court below must be affirmed with costs, and damages on the damages given below.

In *Jones v. Gibson*, 7 Am. Dec. 690, a tax sale of the whole of a tract of land, when a tax was due on a part of it only, was held to be void. To the point that the judgment must be produced in support of the title of a purchaser thereunder, see *Du Four v. Camfranc*, 13 Id. 360, and note 365.

TRUMBO v. SORRENCY.

[8 T. B. MONROE, 284.]

ALL PROPERTY OF A DECEDENT, subject to execution in his life-time, is, after his death, liable to the payment of his debts; and he can not, by his will, exempt any part to the prejudice of his creditors. He may, however, as against his heirs, provide that a certain portion of his estate be charged with the payment of his debts, and that the other parts be exempt.

SUBROGATION OF LEGATEES TO RIGHTS OF CREDITORS.—If the creditors of a decedent seize and apply to the satisfaction of their claims, any personal property which has been specifically bequeathed, the legatee is, in a court of equity, entitled to stand in the place of such creditors, and to subject the lands descended to the payment of his legacy.

ERROR to the Bath circuit. Bill in chancery. The opinion states the case.

Triplett, for the plaintiffs.

By Court, **BOYLE, C. J.** Jacob Sorrencey, by his will, devised to his wife during life his land, household furniture, horses, hogs, cattle, and sheep, and his slaves by name, the slaves to be disposed of at her death as she may think proper, except Ails, whom he directs to be set free at the death of his wife. He appointed his wife executrix, but made no provision for the payment of his debts. In 1817 he died, and his wife took upon herself the execution of the will. After having paid some of the debts of the testator, she intermarried with Trumbo, who

proceeded to pay other debts which, together with those previously paid by his wife, amounted to about the value of both the personal estate and slaves. Trumbo and wife then filed this bill against David Sorrency, to subject the reversion in the land which had descended upon him as the heir at law of the testator, to the payment of so much of the testator's debts as they had discharged exceeding the amount of the personal estate. David Sorrency, in his answer, admits that he claims the reversion as heir of the testator, but insists that it is not liable for the debts of the testator which had been discharged by the complainants, the slaves and personal estate being, as he alleges, sufficient and first liable. The circuit court dismissed the bill, with costs, and the complainants have brought the case to this court.

Land, as well as personal estate and slaves, is by the laws of this country liable to the payment of debts, whether they be due by record, by specialty, or by simple contract, and land in reversion and remainder is liable as well as land in possession; but personal estate and slaves are both liable before land, nor can a man as against his creditors, by his will, exempt either the personal estate or slaves. But as against his heirs or devisees he may do so. And if by his will he exempts his personal estate or slaves, and the creditors, notwithstanding, take them as they may do in satisfaction of their debts, those who are entitled to the personal estate, and slaves under the will, will be entitled in a court of equity to stand in the place of the creditors, and subject the lands descended as well as lands devised for the payment of debts to be sold in satisfaction of their claims. This is called marshaling of the assets. What will amount to an exemption of the personal estate, and give a right to the claimant of it, thus to have the assets for the payment of debts marshaled in their favor against lands descended, has formerly been much agitated in courts of equity; but it is now clearly settled that not only express words contained in the will, but an intention plainly manifested, is sufficient for that purpose, and a gift by will of a specific thing, and even of a pecuniary legacy, has been held to be a sufficient manifestation of the intention of the testator to exempt the personal estate to that extent as against lands descended.

Thus in England, where lands as well as personal estate are liable to the payment of specialty debts, it is laid down as a general rule that if the testator give, by his will, a cow, or a horse, or any specific legacy, and leaves a debt by mortgage or

bond in which the heir is bound, the heir can not compel the specific legatee to part with his legacy in case of the real estate, and though the creditor may subject this specific legacy to his debt, yet the specific legatee will in equity stand in the place of the creditor: Madd. Ch. 500. We need not, in this case, inquire whether the personal estate bequeathed by the testator to his wife, was intended to be exonerated from the payment of his debts, for the complainants have not in their bill set up any claim to its exoneration; but it was plainly the intention of the testator that his wife should take the slave given to her exempt from the payment of his debts, for being devised to her by name, it must be considered as a specific legacy, and as the complainants have paid debts to more than the amount of the personal estate, it is clear that they have a right to stand in the place of the creditors for so much as they have paid beyond the personal estate as against the reversion descended upon the defendant as heir to the testator.

The decree must be reversed, with costs, and the cause be remanded that a decree may be there entered according to the principles of this opinion, and other proceedings had, not inconsistent herewith.

SUBROGATION OF SPECIFIC LEGATEES TO RIGHTS OF CREDITORS OF A DECEDENT.—In the case of lands descended to the heir, where the executor has, out of the personal property of a decedent, paid debts chargeable both on the real and personal property, and by so doing has exhausted the personal estate, equity permits a specific legatee to stand in the place of the creditors, and come upon the real estate so descended. This it does in the exercise of a power called marshaling assets. The common case of marshaling requires that a person having resort to two funds, shall not by his choice disappoint another who has only one: *Trimmer v. Bayne*, 9 Ves. 209; Story's Eq., sec. 558; *Ram on Assets*, c. 28, sec. 1. Lord Hardwicke, in *Hanby v. Roberts*, Ambl. 127, says: "One rule of marshaling assets is clear; if there are debts by specialty and legacies, and no devise of the real estate, but it descends, if the creditors exhaust the personal estate, the legatees may stand in their place and come upon the real estate. This is against an heir at law." And Lord Eldon in the leading case of *Aldrich v. Cooper*, 8 Ves. 382, says: "In the cases of legatees against assets descended, a legatee has not so strong a claim to this species of equity as a creditor. But the mere bounty of the testator enables the legatee to call for this species of marshaling; that if those creditors having a right to go to the real estate descended, will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not. That in some measure is upon the doctrine of assets; but with relation to the fact of a double fund. Both are in law liable to the creditors; and therefore by making the option to go against the one they shall not disappoint another person who the testator intended should be satisfied." So in *Mollan v. Griffith*, 3 Paige Ch. 402, Chancellor Walworth says: "But as between a legatee, either pecuniary or specific, and the heir at

law, if a debt chargeable both on the real and personal estate is paid by the executor out of the personal property in the first instance, the legatee will be permitted to stand in the place of the original creditor *pro tanto*, and may recover the amount of his legacy, or to the extent of the personal estate so appropriated, out of the real estate descended to the heir:" *Culpepper v. Aston*, 2 Cas. in Ch. 117; *Tipping v. Tipping*, 1 P. Wms. 730; *Lutkins v. Leigh*, Cas. t. Talb. 53; *Lucy v. Gardner*, Bunb. 137; *Bowman v. Reeve*, Pr. Ch. 577; *Robards v. Wurtham*, 2 Dev. Eq. 173. Under the common law as administered in England up to a comparatively recent date the real estate descended was liable only to specialty debts, simple contract creditors being confined to the personal assets. This rule of the English common law, was however, very much relaxed in the United States, and in some of them, as in Pennsylvania, even from the earliest colonial times, lands were made subject to the payment of all debts equally with chattels. In England, by statute 3 and 4 Wm. 4 c. 104, real estate is also made liable to simple contract debts. But while there is now, so far as the liability of the real estate is concerned, no difference between specialty creditors and those by simple contract, there is an important distinction between the real and personal assets of the decedent as to the order in which they are made liable to the payment of his debts.

It is well settled that the personal estate of a decedent is the primary fund for the payment of his debts: *Homes v. Dehon*, 3 Gray, 205; *Clarke v. Henshaw*, 30 Ind. 144; *Rogers v. Rogers*, 1 Paige, 188; *Wyse v. Smith*, 4 Gill & J. 296; *Holman's Appeal*, 24 Pa. St. 174; *Torr's Estate*, 2 Rawle, 250; *Kelsey v. Western*, 2 N. Y. 500. But where there is a deficiency of personal property to pay the debts of the testator, and to make good all legacies specifically bequeathed by him, if the creditors exhaust the personal assets, the specific legatees will be subrogated to the rights of such creditors as against the real estate descended to the heir: *Williams's Executors*, 1717; *Rafferty v. Clarke*, 1 Bradf. (N. Y.) 473; *Shulters v. Johnson*, 38 Barb. 80; *Warley v. Warley*, Bailey Eq. 397; *Commonwealth v. Shelby*, 13 Serg. & R. 348; *Brainerd v. Cowdrey*, 16 Conn. 1; *Spraker v. Van Alstyne*, 18 Wend. 200; *Barklay's Estate*, 10 Pa. St. 387. "Where the real estate does not descend to the heir, but is devised to a stranger, or to the heir taking as devisee, the assets are not marshaled in favor of general legatees so as to throw the creditors on the real assets devised:" *Williams's Executors*, 1717; *Barklay's Estate*, 10 Pa. St. 387; *Humes v. Wood*, 8 Pick. 478; *Wallace v. Wallace*, 23 N. H. 149; *Clifton v. Burt*, 1 P. Wms. 678; *Aldrich v. Cooper*, 8 Vea. 397. But where, in such cases, the general personal estate is not sufficient to pay the debts and the specific legacies, the specific legatees and the devisees shall contribute *pro rata* to satisfy the debts: *Long v. Short*, 1 P. Wms. 403; *Tombs v. Roch*, 2 Coll. 490; *Gervis v. Gervis*, 14 Sim. 654; *Armstrong's Appeal*, 63 Pa. St. 312; *Hallowell's Estate*, 23 Id. 223; *Barklay's Estate*, 10 Id. 387; *Brant's Will*, 40 Mo. 266; *Warley v. Warley*, Bailey Eq. 397. In *Armstrong's Appeal*, 63 Pa. St. 312, Sharswood, J., says: "It was settled in England by *Long v. Short*, 1 P. Wms. 403, that specific devises of land, and specific bequests of personalty must abate ratably in case of a deficiency of assets for the payment of the bond debts of the testator, because both lands and chattels were liable in law for those debts, and it was equally the intention of the testator that the legatee should have the chattels and the devisee the land. In this state, where lands have always been assets for the payment of debts by simple contract as well as by specialty, the rule is general, that wherever there is a deficiency of assets to pay both debts and legacies, specific devisees and specific legatees shall contribute proportionably."

Every devise of land is in its nature specific: *Commonwealth v. Shelby*, 13 Serg. & R. 348; *Woodworth's Estate*, 31 Cal. 595; *Mirehouse v. Scaife*, 2 Myl. & Cr. 695; *Clifton v. Burt*, 1 P. Wma. 678.

A specific legacy is "the bequest of a particular thing or money specified and distinguished from all others of the same kind, as of a horse, a piece of plate, money in a purse, stock in the public funds, a security for money, which would immediately vest with the assent of the executor:" 1 Roper on Legacies, 191; Ram on Assets, 467; *Lawson v. Stitch*, 1 Atk. 507; *Bradford v. Haynes*, 20 Me. 105; *Chase v. Lockerman*, 11 Gill. & J. 185; *Everitt v. Lane*, 2 Ired. Eq. 548.

McMILLAN v. RITCHIE.

[3 T. B. MONROE, 848.]

DAMAGES FOR BREACH OF COVENANT OF WARRANTY, when the amount of the consideration is named in the deed, is that sum with interest from the date of the deed, and not from the time of actual payment, whether before or after such date.

ERROR to the Harrison circuit. Covenant. The opinion states the case.

Crittenden, for the plaintiffs.

Mayes, for the defendant.

By Court, MILLS, J. The defendant in error brought his action of covenant in the court below, on the warranty of the testator of the defendant, setting out the deed of said testator in usual form, and alleging that for the "consideration of fifty pounds, to him in hand paid," the testator conveyed one hundred acres of land with a general warranty annexed. Breach was assigned that the defendants in error had been evicted of part by title paramount in a due course of law. On the trial the defendant offered evidence to show that the consideration-money was paid several years before the date of the deed declared on. This evidence was objected to, but admitted, and after it was heard, the jury, at the instance of the counsel for the defendant in error, was instructed: That if the jury believed, from the evidence, that the consideration was paid some years before the date of the deed, the defendant in error was entitled to the interest on said payments from the time they were made until the date of the deed as well as afterward. To this instruction an exception was taken, and it is now relied on as sufficient to reverse the judgment.

The general rule is well settled that the value of the land at the date of the warranty, and not at any other date, is the proper

criterion of damages, and to ascertain this value the price stipulated between the parties is the best evidence. To this general rule, like all others, there may be exceptions; but this case presents no circumstances which can make it an exception. Indeed, the instruction given admits that as the criterion, but adds to it a quantity of interest before the date of the deed, as a matter of law which the jury were bound to find. It is true that the interest on the value, after the date of the warranty, is annexed as a legal criterion by numerous cases, but this arises from the construction of the covenant itself, which is defined to be a stipulation to return the value with interest from its date. If the covenant includes no more and no less it is hard to perceive the principle which can alter and enlarge that criterion by proving matters *dehors* the deed. If this be correct, two deeds, of precisely the same expressions, may each have a different criterion of damages, and because the consideration was paid long before its date, and in the other case long afterward, which is a phenomenon in the construction of covenants containing precisely the same expressions. We, therefore, conceive that the court below erred in its instruction given to the jury, and for this cause the judgment must be reversed, and the verdict be set aside, and the cause be remanded for new proceedings, not inconsistent with this opinion.

See *McKean v. Reed*, 12 Am. Dec. 318; *Henning v. Withers*, 6 Id. 589; *Cox v. Strode*, 5 Id. 603, note, 607; *Gore v. Brazier*, 3 Id. 182; *Staats v. Ten Eyck's Executors*, 2 Id. 254; *Drury v. Shumway*, 1 Id. 704; *Horsford v. Wright*, Id. 8 and note, 9.

THOMPSON v. CLAY.

[3 T. B. MONROE, 359.]

ESTOPPEL, PARTIES.—To use a judgment as a bar to another action, it must generally appear that the parties to both actions are the same. But there are exceptions to this rule.

A DECREE OF BILL DISMISSED, for want of sufficient parties defendant, is, unless it reserves his rights, as conclusive on the complainant as a decree upon the merits.

DISMISSING A BILL ABSOLUTELY for want of proper parties, is an error entitling the complainant to a reversal, if he chooses to appeal.

ERROR to the Woodford circuit. Bill in chancery. The opinion states the case.

Crittenden, for the plaintiff.

John J. Marshall, for the defendants.

By Court, MILLS, J. Anthony Thompson, the plaintiff in error, filed his bill in chancery, alleging that Richard Young departed this life, having previously made his last will and testament, in which he authorized his executors to sell all his lands not specifically devised, and on his executors failing to act, Porter Clay became his administrator with the will annexed, who, in conjunction with the heirs and devisees, at the legislative session of 1815, procured the passage of an act of assembly authorizing him to sell the undevised lands of the testator on his executing an additional bond, with security, for a faithful discharge of the trust; which bond he executed, and then sold and conveyed to the plaintiff in error a tract of upward of eighty acres of land, one half the price of which was paid, and two notes for two equal installments of the residue were executed; that Whitaker and Wilson having a claim by deed against the testator, brought suit against his administrator and heirs; and the heirs in pleading set forth the same tract of land with others, as assets descended to them; and on the rendition of judgment, it was rendered to be levied on this tract, with the assets descended; and on the emanation of execution, this tract was seized and sold; and that to save himself from a loss of the land, and to avoid danger and trouble, he, under advice which he had taken, became the purchaser, at the sum of about three dollars per acre, which became a credit on the execution of Whitaker and Wilson against the administrator and heirs; and on a final settlement of that demand, they had claimed and obtained credit for that amount, but the administrator had refused to give the plaintiff in error credit for the same sum on these notes, but had assigned one of them for the two last installments to William D. Young and Hudson Martain, administrators of John Jackson, deceased, who had recovered judgment thereon, and Porter Clay had also recovered his judgment on the remaining bond. He prayed for and obtained an injunction, made Porter Clay with William D. Young and Hudson Martain defendants, and prayed a discount against their judgments for the amount paid by him to the sheriff on the sale of the land by execution, alleging that the estate of Young was insolvent.

In bar of this bill, Clay, Wm. D. Young and Martain, pleaded a decree in a former suit, brought on the same equity and for the same relief, and set out the record and proceedings of the first suit as part of their plea. The court below sustained the bar, and dissolved the injunction, and dismissed the bill with costs and damages; to reverse which decree this writ of error is

prosecuted with supersedeas. That a decree in chancery on the merits will bar another suit for the same cause as readily as one judgment at law will bar another recovery, is a proposition too well known to need any aid from authority. Upon examination of the first record pleaded in bar, it is evidently a bill containing the same equity and seeking the same relief, and must therefore be held a valid bar, unless some special circumstances are found, which will make the case an exception to the general rule. It is insisted by the plaintiff in error, that this bill charges that the assignment of one of the notes enjoined, was made by Porter Clay, administrator of Young, to Hudson Martain and William D. Young, who were the administrators of John Jackson, deceased, and the first bill alleged the assignment to be made to them in their individual right, and therefore the equity may be different.

We can not say that the appellation of administrators, added to the names of the assignees, means anything more than a description of person; and it is not alleged that they hold this note and judgment in their fiduciary character, and if it was so charged, we can scarcely conceive of a case where administrators could become assignees of a note and not hold it in their individual right; as the office of administrator confers no authority to trade in notes, without involving individual responsibility, and a decree against, and for such administrator as an individual, would affect his title to the note as administrator, and *vice versa*. It therefore follows that this ground can not exempt this bill from the effect of the bar. But the most plausible grounds urged in favor of the plaintiff in error, is that this bill alleges that one of the notes enjoined was assigned to Hudson Martain and William D. Young, and the first bill charged that the assignment was made to William D. Young alone. Hence, it is urged that the parties here are not the same as in the first bill, and therefore the first record can neither be pleaded nor given in evidence in this suit.

It is readily conceded, as a general rule, that to use one record or decree in evidence, as a bar in another, they must both be between the same parties; but this must admit of some exceptions, and must operate consistently with other rules on the same subject. Here, the party relies on this rule, who committed the error in the first bill, which made too few parties to it, and who submitted to an absolute decree on the merits in the first case, barring his equity. No party can use a former decree as a bar, who would not have been affected by it, if it had been

against him; nor can any person be affected by it who could not have been benefited by a former decree, had it been in his favor. If the present complainant had succeeded in the first suit by a decree on the merits, he would have been relieved to the extent of his claim, and the administrator of Young and his assignee could not have asserted the claim afterwards. In the first bill he made too few parties, and a decree passed against him on the merits, to which he submitted, and however erroneous that decree may be, yet, as it is rendered by a court of competent jurisdiction, and remains unreversed, it must have its operation, when used collaterally as this is. If it be true that one of these notes was assigned to two, he ought not to have prevailed in that case without joining both; but as it was his own error to do so, and the decree was absolute, and not without prejudice, he can not proceed anew against the same parties to that suit, for they are shielded by an absolute decree; nor can he proceed without them against the new parties, which he has made in the present bill, because this bill would, in that case, not have the proper parties, and he could obtain no partial relief against some who were joint owners of the same equity and omit others who held the remaining undivided interest.

But another consideration will operate conclusively against the present complainant, and that is the universal practice adopted in this court of reversing decrees that are absolute, dismissing bills because the proper parties were not before the court, and remanding the causes that decrees of dismissal may be entered without prejudice, and that at the instance of the party who committed the error in omitting to make the proper parties in the first instance. This practice has long prevailed in accordance with the practice of the English chancery, and if an absolute decree, in a case where all the proper parties were not made, is no bar to another suit for the same cause, where the proper parties are made, then such reversals are idle and nugatory, as they only annul decrees, which, in themselves, are inoperative and harmless. This practice proves the judicial sense of the country, that an absolute decree, with too few parties before the court, would bar a bill with the right number of parties founded on the same equity, and claiming the same relief.

If it were not so, the consequences might be mischievous and injurious to rights once settled by litigation. Who are and who are not proper parties is often a difficult question, and we are aware that, owing to the inattentive and hurried manner in which

business is conducted in our courts of original jurisdiction, many decrees are rendered settling important rights, where all the proper parties were not before the court; and if all these decrees are to go for nothing, and the parties are at liberty to relitigate the matter by a new bill with proper parties, then the titles of property will be rendered precarious and unsettled, and the first suits which were supposed to settle these rights are only the means resorted to by complainants to feel their way, until by renewed attempts they can be successful.

The decree of the court below must, therefore, be affirmed with costs and damages, on the damages given in the court below.

HARPER v. BAKER.

[3 T. B. MONROE, 422.]

THE GENERAL ISSUE IN REPLEVIN admits the right of property to be in plaintiff.

TRESPASSER BY RELATION.—One who receives possession of property known to him to have been wrongfully taken from another, does not thereby become a party to the wrong, and can not be held liable as a trespasser by relation.

AGREEING TO A TRESPASS committed for one's use makes him guilty of trespass, and liable as a trespasser.

ERROR to the Madison circuit. **Replevin.** The opinion states the case.

Caperton and Breck, for the plaintiff.

Turner, for the defendant.

By Court, OWSLEY, J. This writ of error is prosecuted to reverse a judgment recovered by Baker, in an action of replevin, brought by him in the court below against Harper and James. The trial was had on the general issue, and in its progress several questions were made to the court and decided, to which exceptions were taken by the counsel of James and Harper. The correctness of the decision upon each question is controverted by the assignment of errors.

With respect to the first question made by the defendants in the court below, it is proper to premise that it involved a point totally irrelevant and impertinent to the issue made up by the parties, and which the jury were sworn to try. Evidence was introduced for the purpose of disproving Baker's right of property in the horse, for the taking of which the action was

brought, and the object of the defendants in the first question made was to obtain such an instruction from the court, as would enable them to succeed before the jury, on the ground of a lack of right of property in Baker. Whether, therefore, the law be or be not as was contended for by the counsel of Harper and James, it is perfectly clear that the court can not have erred in refusing to give the instructions, for the doctrine is well settled that by pleading the general issue in replevin, the defendant admits the right of property to be in the plaintiff, and that no evidence is admissible to disprove it: 2 Esp. N. P. (Am. Ed.) 227; Bull. N. P. 54, and, of course, the court can not be bound to give any instruction to the jury, for the purpose of influencing the jury against the right of the plaintiff to the property, as admitted by the defendant's plea.

But, in deciding upon the first question made by Harper and James, the court did not barely refuse to instruct the jury as asked for by them, but moreover went on to instruct the jury differently, and the instructions, as given, are complained of by the assignment of errors. Though different from the instructions as asked for by Harper and James, the instructions which the court gave relate to the right of property, and go to express the opinion of the court as to the right upon a hypothecated state of facts, which the evidence conduced to prove. But whether or not, upon the facts supposed, the law was correctly expounded by the court, cannot be material in the present case, and need not be considered by us. It was, undoubtedly wrong for the court to permit the parties, by traveling out of the issue, to draw from it an opinion hypothecated upon facts totally irrelevant to the point in contest, and for doing so, were there no other error in the record, it would be worthy of consideration, whether the judgment ought not to be reversed. But as there is another point upon which the judgment must be reversed, and as upon another trial of the issue it will be perceived that no question as to the right of property in Baker will be involved, we shall not stop to inquire whether or not, in point of law, the court were correct upon the facts supposed in its instructions to the jury.

The point upon which we are of opinion the judgment must be reversed, grows out of the following state of facts. It was proved that the horse, without the participation or concurrence of James, and in his absence, was taken from the possession of Baker by Harper, but that at the commencement of the action the horse was in the possession of both James and Harper. The

court was asked to instruct the jury that as there was no evidence against James, they must find for him; but the instructions as asked for were refused, and the jury instructed that if they should find that Harper got the horse without Baker's consent, and that James was apprised of the manner Harper got the horse, when he obtained the possession, as it did not appear how he got the possession, James was a trespasser by relation, and in that event they must find against him. In this instruction the court has carried the doctrine of trespasser by relation further than we have any recollection of having hitherto seen it carried by any adjudged case, or commentator upon law, and further than we suppose, upon legal principles, it ought to have been carried. We admit that by agreeing to a trespass committed by another to his use, a person may, though he were absent when the trespass was committed, become principal, and that in an action against him for the trespass, it would be competent for the court, hypothecating its opinion upon such a state of facts, to instruct the jury to find for the plaintiff. But such we do not understand to be the import of the instructions under consideration. By the instructions which were given, we understand the court, in substance, to have decided that though James may have been absent when the trespass was committed by Harper, and though it was not committed for his use, yet if he afterwards, with a knowledge of the trespass, received the possession of the horse which Harper had taken in the perpetration of the trespass, that James was a trespasser by relation, and liable to the action as such.

It is true, the court seems to have placed some stress upon the circumstance that it did not appear in evidence how James became possessed of the horse. But if, from that circumstance, the court inferred the fact that the trespass was committed for the use of James, and after drawing that inference, came to the conclusion it did upon the law, it evidently took upon itself the decision of a fact, which, according to well-established principles, ought to have been decided under all the circumstances by the jury, and which it was incompetent for the court to decide.

It results, therefore, that in its instructions to the jury the court erred, and that the judgment must, consequently, be reversed with costs, the cause remanded to the court below, and further proceedings there had not inconsistent with this opinion.

On the point that one who agrees to a trespass committed by another for his benefit, is liable as a trespasser, see *Caldwell v. Sacra*, 12 Am. Dec. 285, and note.

DURRETT v. SIMPSON'S REPRESENTATIVES.

[3 T. B. MONROE, 517.]

WASTE AFTER CONTRACT OF SALE, where possession is to be delivered at a future day, must be borne by the vendor if committed by his tenants. In such a case he must tender compensation before he can require the vendee to perform his part of the contract.

A PAROL GRANT of a branch line from a principal line of water pipes from a fountain, creates a tenancy at will only. It does not disable the grantor from executing a prior contract of sale.

VIOLATION OF CONTRACT OF SALE.—A contract to sell the privilege of water in the state in which it then was, is violated by a subsequent sale of a branch line from the principal line of water pipes.

RIGHT TO ENTER AND REPAIR OR TO INSERT NEW PIPES is not secured by a stipulation in a conveyance to the effect that the pipes conveying water through the lot are to remain undisturbed by the grantee.

RESCISSION, GROUNDS FOR.—If the vendor of a hotel agrees to convey with it the water privileges as they then were, and subsequently sells and conveys the land through which the water pipes pass, the vendee is entitled to a rescission of the contract.

RESCISSION, BAR TO.—If the complainant has disposed of and is unable to restore part of the consideration received by him, he can not obtain a decree of rescission; but it is otherwise where the disposal has been by the defendant.

ON RESCISSION OF A CONTRACT OF SALE, if the defendant, as part of the consideration, has received property which he can not restore, he must account for the price at which it was estimated in the contract, with interest thereon from the date at which he received possession of such property.

IF DEFENDANT DIE AFTER ANSWER, the suit may be revived against his administrators and minor heirs, by consent, and a guardian *ad litem* need not answer.

APPEAL from the Montgomery circuit. Bill in chancery. The opinion states the case.

Crittenden and Mayes, for appellant.

Trimble and Triplett, for appellees.

By Court, **MILLS, J.** Paul Durrett, the appellant, purchased of Joseph Simpson a lot of ground in Mountsterling, with sundry buildings situated thereon, used as a tavern, called the Hotel, at the price of seven thousand dollars, and for part of the price thereof paid him another house and lot at the price of two thousand six hundred dollars. The contract was made and reduced to writing on the seventh of March, 1817, in the form of articles of agreement. Besides the two thousand six hundred dollars for the house and lot aforesaid, Durrett paid five hundred dollars in hand, and was to assign him a note on John Pugh & Co.

for the sum of seven hundred and fifteen dollars, and to deliver up Simpson's own notes for one hundred and sixty-five dollars; and was, further, to pay one thousand dollars on the thirteenth of January, 1819, one thousand dollars on the thirteenth of January, 1820, and one thousand dollars more, the last payment, on the first of January, 1821. The estate was then held by Thomas L. Patterson under a lease from Simpson, which did not expire until the thirteenth of January, 1819, on which day Simpson stipulated to give the full possession of it, and was to convey at any time, so soon as the boundaries were ascertained.

Durrett paid all the payments due before the thirteenth of January, 1819, when possession was to be delivered, and shortly after that day filed this bill praying a rescission of the contract and a restoration of the payments made, relying on sundry grounds stated in his bill, all of which are either untrue or untenable, and need not be noticed, except the following: 1. That the boundary was ascertained, but it left out a part of the stable which was attached to the premises, and named in the articles as sold; it being situated in part on an adjoining lot and divided by the true line.

2. That Thomas L. Patterson, the tenant of Simpson, during tenancy, and after the purchase of Durrett, had so wasted, injured and dilapidated the house that it would take a large sum to repair it; and Simpson, on that day, could not surrender the possession in the order in which he was bound to do it, according to the tenor of his contract.

3. That Simpson owned a spring near three hundred yards from the hotel, from which he had formerly made a conduit or line of pipes, under ground, which conducted water in abundance into the yard of the hotel, where the water was discharged in abundance for necessary purposes, all which were in existence at the date of the purchase, and in the articles of agreement. Simpson had covenanted in the following words: "That the privilege of the water-works, as they now are, shall remain, and the benefit thereof remain, to said Durrett forever, so far as respects the right to the spring, and the privilege of the conveyance of the water, as it now is." That Simpson, after the date of the contract, had branched lines of pipes from the main conduit, and sold the benefit of the water to others, thereby robbing the premises sold of their supply. That the line passed through grounds not held by him, and from the owners thereof he had no conveyance or grant authorizing him to continue the use of the pipes, and had disabled himself and curtailed that

privilege on his own grounds, and, therefore, could not convey the privilege of the water-works as they were at the date of the contract; and that the supply of water was of great value to the estate sold.

That on the day that possession was to be delivered, he tendered one thousand dollars specie, then due, and Simpson by his agent, tendered a deed of conveyance, which he, Durrett, refused to accept, because the dower of Simpson's wife was not relinquished, because the deed did not include the stable, because the estate was then much injured by Simpson's tenants, and because the conveyance tendered did not pass and secure the privilege of the water-works, as they existed at the date of the contract, and could not at that time do so. That Simpson tendered the possession, which he refused to receive. The defendant, Simpson, answered, contesting or denying all these grounds of equity. He afterwards sued at law to recover the purchase-money, and recovered judgments, which Durrett enjoined by an amended bill. During the progress of the cause, Simpson departed this life, and the cause was revived, by consent, against his administrator and heirs. On a final hearing, the court below decided against all the grounds of equity set up in the bill, except that which charged that the stable did not all stand on the premises sold, which the court held not to be sufficient to vacate the contract, but only to entitle the complainant to compensation. This compensation was ascertained by a jury, and the court credited it on the judgments at law, and dissolved the injunction for the residue, with damages, and dismissed the bill, directing each party to bear his own costs. From this decree Durrett appealed, and its merits are now before us.

The court below did right in sustaining the claim for the lot sold, not including the stable; for it is evident from the proof, that the stable, which is expressly mentioned as included in the sale, and which was supposed to be on one boundary line, is projected over the line about five feet four inches. On whose ground it is extended does not certainly appear. Perhaps, by the plat, it is on the street or public square; but, certain it is, on ground not belonging to Simpson. This would subject Durrett to a removal or loss of the stable, and, of course, to some expense; but as this was evidently a mere mistake of the parties, and might have arisen between different surveyors, and as the stable is one of logs, and of some age, and no objection to its being removed being shown, and the expense of removal is

proven to be about one hundred dollars; assuming this as the only ground of equity sustained, we should not be disposed to disturb the decree of the court below on this point. Had this mistake been known at the time, it might have occasioned a provision in the contract to meet the inconvenience; but it is not probable that it would have prevented the contract altogether, or essentially altered any of its features, and such mistakes are frequently held, in equity, to be a subject of compensation, rather than a ground of rescission of a contract, to which they bear but a very small proportion in value. But such mistakes, when not alone, but are joined to other tenable grounds, in a question of rescission of contracts, may become additional reason for rescission. We shall, therefore, examine the remaining grounds relied on here, and see whether they be or be not tenable to any extent, before we determine that this mistake shall have no greater weight in the decision of the controversy.

We do not concur with the court below in overruling the claim for damages and injury done to the estate, by the tenants of Simpson, after the day of sale, and before the possession was to be delivered. On this point there is no express provision in the articles of sale. Of course, it may be assumed that the purchaser meant to run the risk of deterioration, by an ordinary and proper use of the estate; but it is against the intention of the parties, and the spirit of the contract, to suppose that the vendee was to bear every injury which might be inflicted on the estate, until the possession was delivered. It is clearly shown that Patterson, the tenant of Simpson, frequently gave up the use of a room or rooms in the house, to be used by mountebanks and exhibitors of shows and spectacles, for gain, who drove spikes into the floors or walls, or inserted screws into them, to suspend their scenery and apparatus, which injured the floors, and broke, in many places, the plastering on the walls, which were made of brick, which was of considerable injury; but what is still more, the tenant, or some of his sub-tenants, suffered the garret to be very improperly appropriated, by reason of which the plastering was much stained and loosened from its hold in the lower apartments of the house, so that the cost of repairing it would be considerable.

As to this cost of repairing, there is some contrariety in the testimony; but as to the appropriation of the rooms to these purposes, there is no conflict. Two or three persons, who were called to assess damages for this injury to the estate, between Simpson and Patterson, depose that they assessed it to about

twenty dollars, and suppose that sum to be enough for the difference in the property between the commencement and termination of Patterson's tenancy. But these witnesses must have gone on the supposition that much of this injury had been done before Patterson entered. For there are two or three others who boarded with Patterson, and knew well the condition of the house before and afterwards, and who are plasterers and, therefore, proper judges of much of the injury, fix its date after the sale, and depose that the plastering can not be repaired by patching it, but must be removed, and the walls washed, to place the house in the same situation, and the costs for doing so would be from five hundred to seven hundred dollars. We will not, for the present, inquire whether this alone would be good grounds for rescinding the contract. It must, at least, be a matter of fair compensation. As no such compensation was offered or tendered to Durrett on the day that his possession was to commence, he might be well warranted in refusing either the possession or conveyance.

Every reason must prove that Simpson, and not Durrett, was to run the risk of this injury. The estate was leased for Simpson's benefit, and to him alone his tenants were responsible. There is no similarity between this case and the one relied on in argument, where the vendee is compelled to complete the contract when the buildings were consumed by fire, without the fault of either party. Here the injury must be held to arise, indirectly at least, from the act of the vendor, and he ought not, therefore, to be permitted to compel the vendee to bear the loss. We will now attend to the third ground of equity arising from the water-works, and defects in the deed tendered by Simpson.

There seems to have arisen between the parties this controversy on this point, which has been debated in this court. Part of the line of pipes passed through the property of others, and for several yards across the public square. On the part of the vendee, it is contended that the true construction of the agreement, as before recited, is that Simpson was bound to obtain, secure, and convey to Durrett the continued privilege of the line, in the order it was at the date of the contract over all the intervening ground between the spring and hotel. On the other side, it is insisted that Simpson was by the stipulation, only to place Durrett in his stead and possess him of the privilege as then held, and no more, subject to such interruption as might thereafter arise from the holders of the intervening property re-

voking or terminating their grants, such as they were, to insert the pipes at first. Without determining between these two positions, we shall content ourselves with saying that as the fountain, and a considerable portion of the ground intervening between it and the hotel, belonged to Simpson, the stipulation could not mean less than securing to Durrett all the privilege then held by Simpson, of drawing the water from the spring and passing it forever, uninterrupted, so far as it passed through the land then held by Simpson himself; and we will then inquire whether Simpson after the date of the contract, and before his tender of a conveyance, had curtailed this privilege by intervening sales and conveyances.

One charge of violation of this stipulation by Simpson, after the date of his contract, and before he tendered a conveyance, is that he took a branch line to the lot of George Howard, and from that branch another to the lot of William Hopkins, thereby lessening the supply at the hotel. It is in proof that such lines were taken out; for which Howard and Hopkins were to pay, one twenty-five dollars, and the other ten dollars per annum. But these grants were given in word only, without any period of continuance being fixed, and were, therefore, revocable as other tenancies at will, and could not prejudice the original line to any extent. Durrett, after his conveyance from Simpson, would as to these have stood in the shoes of Simpson, and would have been entitled to the revenue therefrom, or to discontinuance of the grant. Of course, this was no disposition of the water which could seriously injure the interest of Durrett.

It is urged in the bill that Simpson had sold to John Williams, and given him a conveyance bond for a small square out of the hotel lot before his sale to Durrett, and that he had conveyed to Williams, without reserve, the ground afterward, including the line of pipes which passed under a house erected by Williams, which made the line inaccessible, and so that it could not be repaired. This bond to Williams is tendered as a part of the bill, but is not produced. On the contrary, a conveyance of record to Williams is produced, made nearly one year before the purchase of Durrett. In that conveyance Simpson passes the ground, reserving only the right of entering for the purpose of removing and taking away the water pipes which passed through it; but not the right of again inserting them. But this sale to Williams was known at the date of the sale to Durrett, for the conveyance was not only of record, but the

written contract with Durrett refers to it on its face, and purports to pass to him all the hotel lot, improvements and appurtenances, "except a part or piece the said Simpson had sold to John Williams." This part sold to Williams was a small square carved out of the hotel lot itself, covering the line of pipes, which Simpson, in the conveyance to Williams, reserved the right of removing. Now, it is evident from the inspection of the plat made in this cause that if the water was discharged from the pipes before it reached the premises of Williams, it would still supply the hotel lot, or that the line could be taken around the premises of Williams, and supply the hotel itself. Of course, the sale and conveyance to Williams was not a serious interruption of the water, and such as it was, it was known to the parties at the time, and the inconvenience was to be borne by Durrett; and, of course, as to the sale and conveyance to Williams, he had no right to complain.

The next disposition of water by Simpson which we are to notice is a line extending from the line leading to the hotel to the lot of McGowan and Stockton. This is the same lot which Durrett had conveyed to Simpson in part payment for the hotel estate, and Simpson afterward sold and conveyed it to McGowan and Stockton, having previously run a branch line of water pipes thereto, and in his conveyance to them only reserved half the water to be conveyed to Durrett. This was a disposition of the water, in violation of the contract with Durrett, and such as Simpson, consistent with his stipulation, ought not to have made. But the last disposition of water, or of his lands through which it passed, without reserving the full privilege for Durrett, is still more serious. After his contract with Durrett he proceeded to sell and convey the spring, which was on an out-lot of the town, and the intervening lands which he held between it and the hotel, to sundry persons, and the several conveyances to them are produced. In all of them he reserves the water privilege and the right of entering and repairing the pipes, except one conveyance to John Anderson of part of the out-lot, at a considerable distance from the hotel, dated the second of May, 1818, extending across the line of pipes which led from the spring. In this conveyance he makes no reservation until after the close of the deed. The following memorandum is added: "It is understood that the pipes conveying the water through said lot are to remain undisturbed by the said Anderson."

Here is no reservation of a right to enter and repair or re-

move the pipes and insert others. Anderson is prohibited from disturbing the pipes already there, but when they have performed their functions the right ceases, and no new ones can be inserted; and it is not shown that there is any way to avoid the premises of Anderson or to come at the water longer than the existence of the pipes already there, and after they are gone the privilege ends. The necessity of water at every habitation is well known; the convenience of it is a great enjoyment, but the value of it to such an establishment as this, on the very spot where water is scarce, as is shown to be the case in this town, is very great, and is rated at different prices per annum by different witnesses, from twenty dollars to one hundred dollars. It must therefore have been a great inducement to this contract, and the absence of it must lessen greatly the value of the estate, and the destruction of the privilege between the hour of sale and that of conveyance and delivery of possession to Durrett must alone furnish him with a good ground for avoiding the contract, and it still becomes stronger by the waste and injury to the property by Simpson's tenants before noticed.

The deed tendered to him only secured to him, in express terms, the existence of the privilege at its date, and not at the hour of sale, which was near two years before that. This privilege had been much curtailed by Simpson in the meantime, and, indeed, placed in such a situation, by his own acts, as precluded him from conveying it. Durrett, therefore, did right in refusing to accept a conveyance and insisting upon a rescission of the contract. But there is an objection urged against setting aside the contract in a court of equity, arising from the conveyance of a house and lot by Durrett, as part consideration for the hotel. This house and lot, as before stated, has since been sold by Simpson, and conveyed to McGowan and Stockton, and it is contended that, as the chancellor cannot place the parties in *statu quo*, by restoring this house and lot, he ought to dismiss the bill and leave the parties to their respective remedies at law.

If this objection lay in the mouth of Simpson, and Durrett, the complainant, had so disposed of what he had received as to be unable to restore, it would be an insuperable bar to setting aside the contract. For he who asks the restoration of the parties to their former situation ought to be able to comply with his part. But it is the defendant, who is bound to restore, that has disabled himself from restoring what he has received, and now relies on his own act, placing this house and lot beyond

his control, as a reason why he should keep all. If such a reason was held valid, then no contract could be rescinded, even for fraud, where the defendant had parted with what he had gotten, perhaps for the express purpose of preventing a rescission of the contract. Of course this objection can not prevail, and as Simpson can not restore this house and lot, he must account for it, at the price stipulated between the parties. This result, upon the whole case, will require an account to be taken between the parties, before the controversy can be closed on the return of the cause to the court below; about the principles of which, it is necessary we should say something.

In this account Simpson's estate must be charged with the price of the house and lot paid by Durrett, as agreed by the parties. And as Durrett retained this house and lot for some time after he was to have delivered the possession of it, he is to have no interest on the price until he actually gave possession; until that time the rent on one side and the interest on the other must be held to extinguish each other. Durrett must be credited with the other payments which he has made, with interest thereon. He must also have credit for any lasting and valuable improvements which he made on the house or premises, as he was, during Patterson's lease, permitted to improve it by an arrangement between the parties. In these improvements must be considered the pavements of its sidewalks appurtenant to the premises. And, as it is insisted that some of these improvements rather injured than improved the estate, if such injury exists, for these improvements Durrett must receive no compensation, but be charged with such injury.

On the day when possession was to have been delivered, Durrett was in possession of part of the house, as tenant of Patterson, and it was agreed that he might retain it afterwards without prejudice to the contract on one side, or the rescission of it on the other. Of course Durrett must be charged with the reasonable rent of such part as he continued to occupy after that day, during the time which he continued to hold it. After the account is thus taken, the contract must be set aside, the injunction be made perpetual, and all securities for the conveyance or purchase-money be surrendered, and a decree rendered in favor of that party who may have a balance due.

The decree of the court below must, therefore, be reversed with costs, and the cause be remanded that such proceedings and decree may be rendered as herein directed, and such fur-

ther orders and decrees made as shall not be inconsistent with this opinion and the principles of equity.

Trimble, on behalf of the appellees, moved for a rehearing on the ground that the suit had not been regularly revived against the infant heirs of Simpson, and that it did not appear their guardian *ad litem* had undertaken the defense.

By Court, MILLS, J. The manner in which this cause was revived is relied on in the petition as sufficient to send the cause back for new proceedings, commencing at that point, and to induce this court to refuse a mandate directing a decree to be entered at once. Whether the cause was or was not regularly revived, is a question that did not escape the attention of the court in the first instance. The appellant in his argument and assignment of errors, then relied upon it to reverse the decree in his favor as the appellees now do to prevent a decree against them, and we deem it insufficient to aid either.

The cause is revived by consent, and a guardian *ad litem* is chosen by agreement, and the only question remaining to be inquired into, is the assent of that guardian to his appointment, for the purpose of showing that he undertook the trust. On this point, the evidence is sufficient. The record shows that he was an officer of court, and the counsel engaged in the defense, and more than one agreement facilitating the progress of the cause, and regulating the evidence therein afterwards, is on file, signed by him, proving that he managed the defense in all respects, and the cause was heard without this objection in the court below. It is true he put in no answer, nor was it necessary, for the ancestor of the infants had answered before his death. There is nothing to prevent a decree ending this controversy, on the return of the cause, especially as it is competent and proper, for the court below to reserve a day to the infant defendants to show cause against the decree, after their arrival at full age.

The petition for a rehearing is overruled.

In *Lide v. Thomas*, 4 Am. Dec. 581, it was decided that where a party purchases land with a certain right or privilege attached, and the vendor is unable to secure the same, as warranted, the vendee is entitled to a total rescission of the contract, or to an adequate abatement of the price.

THORNBERRY v. CHURCHILL.

[4 T. B. MONROE, 29.]

BOUNDARY.—A line marked part of the distance, must be followed in the same direction for the whole distance, unless there is some marked corner to divert it.

WHEN MARKED CORNER TREES can not be found, the point where the lines intersect is treated as the corner.

THE ORDER OF THE CORNERS in a certificate of survey is of no importance in determining a question of boundary.

CONSTRUCTION OF DEEDS.—The proper construction of patents, conveyances, and other written muniments of title, is a question of law for the court to determine.

EJECTMENT. Appeal from the Bullitt circuit. The opinion states the case.

Mayes, for appellant.

Crittenden, for appellee.

By Court, BIBB, C. J. The jury having rendered a verdict for Churchill and wife, the lessors of the plaintiff in ejectment, by specified boundaries, the defendant, Thornberry, urged for causes of a new trial, that the jury had found against evidence, and that the court had misdirected the jury, which motion was overruled, and Thornberry has appealed.

The lessors of the plaintiff claim by grant to them, bearing date in 1810, founded upon a survey of two hundred and fifty-four acres, for William Oldham, bearing date in October, 1788, the abutments of which are thus described: "Adjoining a survey of William Flemming, of three thousand acres, beginning at a poplar and beech corner, to William Flemming and Henry Harrison, and with Harrison's line, north 80 east, eighty poles to a beech in William Bryant's line, with the same south two hundred and twenty-eight poles to a beech in William Pope's line, and with the same west two hundred and ninety-seven poles, to a white oak and poplar in Flemming's line, and with the same north 45 east, three hundred poles to the beginning." The beginning corner, common to Flemming, Harrison and Oldham's (now Churchill's) surveys is established; Harrison's line runs through Bryant's survey; the line of Bryant is established; and the certificates of survey for Flemming, Bryant and William Pope, for nine hundred acres, with lines to the cardinal points, were all read in evidence, bearing date long before the date of Oldham's certificate of survey.

It is to be remarked, that William Pope's survey of nine hun-

dred acres conflicts with the military survey of Flemming; Pope's beginning corner is established, which, being within Flemming's, the lines of Pope being described in the certificate of survey as north, south, east and west, it will be seen that Pope's northern boundary extended from his corner within Flemming (whose line, called for by Oldham, is north 45 east), crosses this line of Flemming. This northern boundary of William Pope (crossing Flemming's eastern boundary) is marked part of the way, but varies somewhat from due east and west; but this line is, so far as it is marked, established by a sufficient correspondence in the age of the line trees with the date of the survey, by very near approach to the course called for, by reputation and by the call for it as William Pope's in Thornberry's own survey and grant, obtained upon a warrant from the land-office of Kentucky.

Upon the face of Oldham's survey and patent thereon to Churchill, there is no apparent ambiguity. It is to be bounded on the north by Harrison, on the east by Bryant, on the south by Pope, and on the west by Flemming. But Harrison's line strikes the line of Bryant about thirty poles from Bryant's corner, and Bryant's line in all being but two hundred and twenty-eight poles, the line of Oldham does not and can not run two hundred and twenty-eight poles with Bryant, but, to give the patent distance, must extend beyond Bryant's corner. Moreover, William Pope has no line which extends all the way from Flemming's line to Bryant's, as we are led to expect from the survey of Oldham; the "beech" corner for Oldham, described as being "in Pope's line," can not be established, and the corner trees, white oak and poplar, called for as on Flemming's line, although there, are marked only as line trees for Pope's survey, but not as corner trees for Oldham's survey. Hence Thornberry endeavors to stop Oldham's survey short of Pope's line on Flemming's, and shows a survey of William Pope of six hundred and twenty-nine acres, also bearing date before Oldham's survey and showing the corner thereof, and that this corner is also the corner of Bryant's survey. This would produce a vacancy between the southern boundary of Pope's nine hundred acres, within which space he has caused his survey upon a Kentucky warrant to be made and patented as represented in the diagram. Part of this space he attempts to hold as within his deed from Gatewood, who derives his title under Pope's survey of nine hundred acres.

If the survey of Wm. Pope of nine hundred acres does extend

and cover the land, as claimed by defendant, Thornberry, by virtue of that deed, then, it is true, there would be an interference between Pope's survey and Thornberry's Kentucky warrant, and the jury will have found in favor of Churchill's junior patent of 1810, a part of the land included in the elder grant to Pope, of 1788. It is sufficient to say that the jury very properly repelled the attempt to cover, by Pope's survey of nine hundred acres, any part of the land surveyed by virtue of Thornberry's own warrant from the land-office of Kentucky. The attempt contradicted the evidence in the cause, as well that adduced by himself as that introduced by the plaintiff. So far as the jury gave position to Pope's survey of nine hundred acres, there is no error in fact nor in law. They established the beginning corner of Pope's survey, the marked line from it eastward, as far as the proof of the marked boundary extended, and continued that course, there being no corner found to divert that boundary from the course, being more favorable to the defendant, Thornberry, and giving less land to Oldham's survey, than by taking to the true course of the patent after the marked line ceased. This course was in conformity to the principles of *Vance v. Marshall*, 3 Bibb, 151, 152; *Cowan v. Fauntleroy and wife*, 2 Id. 261; *Preston's Heirs v. Bowmar*, 2 Id. 497.

The beginning corner, common to Flemming, Harrison and Oldham, being extant and established, as also the line of William Pope's survey of nine hundred acres intersecting Flemming's line, the survey of Oldham properly extended from that corner of Flemming and Harrison, along Flemming's line to the intersection of the marked line of Pope's nine hundred acres, no actual corner for Oldham intervening; and whether the white oak and poplar at that intersection were marked as corner trees for Oldham's survey, or only as line trees for Pope's survey, is immaterial. No other corner being in the way, that intersection established was Oldham's corner. The order in which the surveyor gave the lines and corners in his certificate of survey is of no importance to find the position of the survey; by reversing the courses is as lawful and persuasive as by following the order in the certificate of survey. The cases adjudged upon that point are conformable to reason and practical utility in guarding against mistakes and destruction of corners by fraud, accident, and the elements. So far, then, the western boundary of Oldham's survey, and also the southern boundary as far as it depends on Pope's nine hundred acres, is

established by establishing the corner of Flemming, the course of Flemming's, and the intersection of Pope's marked line on Flemming's line.

But the instruction of the court is complained of, which refused to take the corner of Pope's six hundred and twenty-nine acres, common also to Bryant, as one of Oldham's corners; to stop the survey in that common corner, and extend a west line from thence to intersect Flemming's line; and in declaring that the reference in Oldham's survey was to Pope's nine hundred acres, and not to his six hundred and twenty-nine acres. Two objections are stated; the one that the instruction was wrong in point of law, if the survey of nine hundred acres were conceded to be established; the other, that the court in so doing assumed the powers of the jury, and determined the fact. It is true that the small beech marked W. O., four poles beyond the patent distance, in course of Bryant's line, is not to be taken as the original corner for Oldham's survey, because it is not marked as a corner, and the marks on it are of a younger date. Hence, it is argued, because that beech is not Oldham's corner, nor in a line of Pope, that the patent distance should be shortened and stopped at the corner common to Bryant and Pope's six hundred and twenty-nine acres; that this survey of six hundred and twenty-nine acres, and this corner, should be taken for Oldham's survey, and a line extended west therefrom to Flemming's survey, rejecting Oldham's call for running with Pope's line.

But it is worthy of remark and remembrance, that Bryant's corner here, and Pope's corner in the certificate of survey, is not a beech tree, nor any tree; but both the surveys describe it as "in a pond"—it is a pond—the survey of Pope's six hundred and twenty-nine acres describes this as "William Bryant's southwest corner, in a pond and near the side." From this corner, common to Bryant and Pope's six hundred and twenty-nine acres, one line of Pope is south 45 degrees east, with Bryant's line running off from and not towards Flemming; the other line of Pope from this corner is south 25 west, diverging from and not approximating to Flemming. In addition to these, it is worthy of note that the expressions in Oldham's certificate of survey are "to a beech in William Pope's line, and with the same west to Flemming's line." The expression "in William Pope's line" excludes the idea of its being his corner. "In a line," and the "corner" or end of a line, mean different points in the language of surveyors. If the surveyor had in-

tended this to be looked for as a corner common to William Pope and Bryant, he would have called it the corner of the one or of the other; certainly he would not have called for it as "in William Pope's line." This corner of the survey of Pope's six hundred and twenty-nine acres did not fit the expressions in Oldham's certificate of survey; it was neither "in his line," nor was there any line from it running towards Flemming. But the other survey for nine hundred acres made for Pope, was adapted to the expressions of Oldham's survey; it did intersect with Flemming; it was an east and west line, and by reversing the order of the courses named in the certificate of survey, it would be aiding to find the land described. The fitness of the one and the unfitness of the other was a matter of law to the court. The expressions and proper constructions of deeds, patents, and written muniments of title, and the aptitude of documents and papers referred to, to satisfy such words of reference, are matters in law. Suppose a third survey of William Pope had been offered, but bearing date after Oldham's, surely the fitness of such third survey to satisfy the reference in Oldham's survey would have been proper for the court. But two surveys were offered to the court; it was the province of the court to decide which of the two best fitted the description in Oldham's survey. Such fitness and unfitness has often been determined by the court under descriptions in entries, and sometimes, also, in surveys and grants.

The instructions given previously left the jury at large to determine the matters of fact. The judge had before instructed the jury as to the legal consequence in case they were not satisfied by the evidence as to the position of Pope's survey of nine hundred acres; and in the next preceding sentence before that, in relation to the two surveys of Pope, the court had instructed the jury if but one corner of Churchill's grant was proved to them, that the survey was to be closed by the courses and distances expressed on the patent. The instruction, therefore, as given, did not trammel the jury as to the facts, nor take from them, nor interfere with, their proper powers as to the finding of the facts. The instructions, as given in substance and effect, conformed to the principles of *Beckley v. Bryan*, Pr. Dec. 107; *Bryan v. Beckley*, Litt. 91 [12 Am. Dec. 276]; *Lyon v. Ross et ux.*, 1 Bibb, 466; *Vance v. Marshall*, 3 Id. 151, 152; *Cowan v. Fauntleroy*, 2 Id. 261; and *Preston's heirs v. Bowmar*, 2 Id. 493, 497.

Upon fact and law the verdict is right. The judge who tried the cause instructed the jury that the marked boundaries, where

ascertained, should govern, although variant from course or distance; where these failed the patent courses from ascertained corners were to be followed; and the jury, from the ascertained corner of Flemming and Harrison, (2 A.), pursued the course of Flemming to the marked line of Pope's nine hundred acres (at 1) by reversing the order of the certificate of Oldham's survey from the intersection of Pope's nine hundred acres (at 1) with Flemming, they followed the marked line of Pope (to A), and continuing the course of that marked line ascertained the intersection with the course of Bryant's marked line, when extended, and found for the lessors of the plaintiff the abutments 1, 2, 3, 4. The judge very properly refused to disturb the verdict.

Judgment affirmed, with costs.

HENDERSON v. PICKETT'S HEIRS.

[4 T. B. MONROE, 54.]

A SUB-PURCHASER, IN WHOLE OR IN PART, OF AN EQUITY, will be protected from the acts of the original vendor and vendee, and may have a specific execution if he can show a complete equity against his immediate vendor, and also against the holder of the legal title.

PARTIES.—IN A SUIT BY A SUB-PURCHASER for specific performance, the intermediate vendors through whom he has acquired his equity are generally necessary parties.

A DECREE IN A SUIT BY A SUB-PURCHASER against the intermediate vendors and the holder of the legal title, for a specific performance of a contract of sale, is conclusive on all the parties; and hence, to entitle him to such decree, he must establish a valid equity against each.

A SUB-PURCHASER, waiving his claim for specific performance, and suing for compensation for improvements made, should bring in the same parties and establish the same equities as if he were seeking a specific performance.

A PURCHASER PENDENTE LITE is concluded by the decree made in the case. **AN ALLEGATION IN A BILL** contradicted by the exhibit referred to is unavailing.

ERROR to the Bourbon circuit. Bill in chancery. The opinion states the case.

Haggin and Triplett, for plaintiff.

Mayes, for defendants.

By Court, BIBB, C. J. In July, 1818, Henderson exhibited his bill against Pickett's heirs to have pay for improvements, asking a decree against them personally, or for such other relief as might be proper. The bill was taken *pro confesso* upon

order of publication; but Pickett's heirs afterwards appeared, and without answer submitted to a hearing; the court dismissed the bill. So that the case stands upon the statements of the bill and exhibits alone; no proof other than bill unanswered, and exhibits, appear in the cause. The facts are these:

1. That Pickett executed his bond to Bramblett for the conveyance of five hundred acres out of a survey of five thousand acres, in consideration of three hundred and fifty pounds; but as some disputes had arisen respecting other claims, running into the said Pickett's survey of five thousand acres, Bramblett was to make his choice of five hundred acres of the land not in dispute, and on any line or lines, so as "not to cut into it in such manner as to injure the shape of the residue." But if a sufficient quantity does not appear clear of dispute, or if after said Bramblett shall settle the five hundred acres, he should be legally evicted, in either case Pickett to refund the price of three hundred and fifty pounds, by specified annual installments by thirds.

2. This bond was assigned by Bramblett to Starke; and on the twenty-second of January, 1805, it was re-assigned by Starke to Bramblett.

3. That after the death of Pickett, Bramblett agreed with Starke, if he would prosecute a suit against Pickett's heirs for the legal title, and procure it, he, Bramblett, would give Starke "one hundred acres, or some other certain portion thereof."

4. That said Starke prosecuted the suit in the Bourbon circuit court, in pursuance of said agreement "to procure the legal title, and procured a decree for it."

5. After the decree, Starke obtained possession of his part of the said five hundred acres.

6. After the death of Bramblett, that decree was opened "in the name of his heirs."

7. During the progress of this last suit, "or previous thereto, your orator believes it was previous thereto," Starke gave said Henderson (the complainant), who had married Starke's daughter, "a certain part of the land, which he had received as his proportion of the five hundred acres."

8. That Henderson settled on the land given him by Starke, "in faith of a promise from said Starke to convey said land to him, when the suit of Bramblett's heirs against Pickett's heirs, should be closed, and the legal title perfected to the aforesaid five hundred acres of land."

9. That Henderson made lasting and valuable improvements.

10. That in the progress of the suit, said Starke agreed to give up the five hundred acres which had been selected, and to take the land elsewhere, and this agreement between Bramblett's heirs and Starke and Pickett's heirs, bearing date in November, 1817, is exhibited, by which it was expressly stipulated that the land and improvements should be surrendered on the first day of March ensuing, in their then repair, and Bramblett's heirs to take the five hundred acres under the contract of their ancestor, "agreeably to the answer of said Pickett's devisees filed in said suit."

11. The said agreement was filed in the suit of *Bramblett's Heirs v. Pickett's Heirs*, and made the decree of the court.

12. In pursuance of said decree, Pickett's heirs "have got possession of said five hundred acres of land aforesaid, including all the improvements of your orator, without making him the least compensation therefor."

The question now is, whether or not the complainant is entitled to any relief against the heirs of Pickett, upon the statements contained in his bill and the exhibits. According to the well established powers and usages of courts of equity a sub-purchaser in whole or in part of an equity, will be protected against the acts of vendor and vendee, to the prejudice of the rights of the sub-purchaser, and moreover may have a specific execution. But to effect this, he must show his own equity against his immediate vendor, and also an equity against the principal vendor and holder of the legal title. In such suit the intermediate vendors, through whom he derives his equity from the principal or holder of the legal title, are, in general, necessary parties. If he proves an equity against his immediate vendor, but fails to establish his equity against the principal or first vendor, yet he can have no decree. So, if the immediate vendor of the sub-purchaser resists the equity of the complainant, and supports an equitable defense or bar to a decree as between them, the complainant can have no decree against the remote vendor. The decree is in such case conclusive as to the rights and equities of all the parties as to each other severally as well as jointly.

If Henderson was seeking a conveyance of the legal title to the land from Pickett's heirs by virtue of an equity derived from Starke, who derived his from Bramblett, who purchased the five hundred acres of Pickett, then it is clear that Starke and Bramblett's heirs would be necessary parties; and Henderson would be required to show, not only his own and Starke's

equity under Bramblett, but also that Bramblett's heirs were entitled to a decree for the land upon which Starke had settled Henderson. In such a suit, Henderson would be required to allege and show that Bramblett's selection was conformable to the terms of his contract with Pickett. If Pickett's heirs should deny such allegation, and the fact should turn out that such selection claimed by Bramblett, Starke and Henderson was not according to contract, that it was not in the part clear of dispute, or not on a line or lines, but off from them, cutting into the tract, and injuring the residue, then Henderson could have no decree, and, like Bramblett's heirs, would have to submit to a decree in favor of Pickett's heirs to have the five hundred acres laid off elsewhere and agreeable to contract. Henderson, failing against Pickett's heirs, would have to look to Starke.

But this bill does not seek a specific performance and conveyance of the land according to Starke's promise to Henderson, under Starke's agreements with Bramblett, and Bramblett's agreement with Pickett. If it were so, this bill would be defective for want of necessary parties, and for want of equity against Pickett's heirs. Starke and Bramblett's heirs are not parties; nor does the bill allege or pretend that the selection of the five hundred acres upon which Henderson settled had been made according to the agreement by and between Pickett and Henderson. The contrary would seem to be the fair inference to be deduced from the bill and exhibits. No allegation appears that such selection was according to contract. Bramblett's heirs and Starke have acquiesced in the resistance made by Pickett's heirs to that selection, and have consented to take the land elsewhere "agreeably to the answer of said Pickett's devisees, filed in said suit." If Henderson sought a decree for the land he had improved, he would be bound to show some fact to satisfy the court that this decree to which he says he was not "party or privy," was improper, that it prejudiced his rights. In other words, the onus would lie upon Henderson to show that the first selection was according to the terms of the contract. He would also be required to show a case which would entitle him to a decree against Starke.

Can he, then, by waiving the principal subject, and asking for an incident, dispense with those necessary parties and allegations, which would be essential to establish his equity to the principal. The complainant does not attempt to overhale the agreement and decree between Bramblett's heirs and Pickett's

heirs, made under the superintendence of Starke, he does not object to the justice of the defense made by Pickett's heirs, by which they successfully resisted the claim of Bramblett's heirs to the land first selected; he does not complain of any fraud or collusion, or improper yielding to the defense of Pickett's heirs; he omits to make Starke a party; he omits to ask the land itself; he omits to allege that he, the complainant, had received no compensation from Starke for the improvements; but omitting all these, he submits to the agreement and decree. Why this omission and submission? Is it because he has received compensation from Starke, in money, or by a like quantity of land out of the tract decreed according to the answer of Pickett's heirs? Is it because of the fact that the selection of the five hundred acres was made in violation of the agreement? Why did he fail to apply during the pendency of the suit between Bramblett's heirs and Pickett's heirs, and ask the court to protect his interests against the allegations of Pickett's heirs; that the complainants, Bramblett's heirs, were not entitled to the land claimed, but were bound to take it elsewhere? The claim of Henderson, according to the bill, hung upon that suit. It was a promise by Starke, "to convey said land to him, when the suit of Bramblett's heirs against Pickett's heirs should be closed, and the legal title perfected to the aforesaid five hundred acres of land." At the very time he entered into possession, he had notice of the *lis pendens*, and defended upon the event of the controversy, and the success of Bramblett's heirs in that suit. As his claim commenced pending that suit, and was but a contingent interest in the controverted subject, by its very terms to await the closing of that controversy, Henderson is a privy to that suit, although he was not a party, and is bound by the decree.

Although the bill alleges that the agreement in that suit did not extend to the improvements, yet that allegation of the bill itself is contradicted by the agreement referred to and exhibited. If Pickett's heirs compensated Bramblett's heirs, and Starke, or either; if neither Bramblett's heirs nor Starke could now have in equity a decree against Pickett's heirs for the improvements, Henderson can be in no better situation. If Henderson is entitled to a decree for the value of the improvements against Pickett's heirs, it will be in violation of the terms of the agreement and decree alleged in the bill, as made in that suit. It must be permitting Henderson, although a privy in estate, acquiring a mere equity, pending the suit, and with notice of its

pendency, to escape the effect and consequences of the decree in that cause, and now to overhale and controvert the justice and merits of that decree. The rules of equity, founded on the soundest principles and wisest policy, forbid the opening of that controversy in favor of Henderson, upon the statements of his bill. "*Interest reipublicæ ut finis sit litium*" (it is important to the community that there be some end to litigation), is a maxim in equity.

The complainant is not asking the benefits of the statute concerning occupying claimants by bringing a case within its provisions and submitting himself to the conditions and terms thereof; he is not asking a specific performance of any agreement; but he comes into a court of equity asking to be paid for improvements. In this bill he does not ask relief against the person in faith of whose promise he settled and improved, but against those with whom he made no agreement. His counsel asks the decree upon the broad foundation that every seater and improver, who, being a possessor *bona fide* bestows his labor and improvements on the land, shall be compensated by the right owner. Is Henderson such an improver, such a *bona fide* possessor, as that, by the precedents and usages of courts of equity, he shall charge the value of his improvements as a personal account against the heirs of Pickett, or as a lien on the land? Who shall or shall not be considered a *bona fide* possessor has been explained by general rules and by examples. In *Dormer v. Fortescue*, 3 Atk. 134, Chancellor Hardwicke, whose character commands the undivided respect of the profession, whose decisions are stamped with the united authority of learning and common sense, has given the rule thus: "But where a man shall be said to be a *bona fide* possessor is, where the person possessing is ignorant of all the facts and circumstances relating to his adversary's title." As to Henderson this could not be. He states expressly in his bill that his settlement and improvements were made "in faith of a promise from Starke to convey the said land to him when the suit of Bramblett's heirs against Pickett's heirs should be closed and the legal title perfected." This is his statement as to the settlement of the land. As to the gift, he had stated that he was uncertain whether it was made before or after the first decree was opened. As to the settlements and improvements, they were made after knowledge in fact of Pickett's title, how Bramblett and Starke claimed under Pickett, and of the pending litigation between Bramblett's heirs and Pickett's heirs.

Acknowledging the powers of a court of equity to protect the interests of a sub-purchaser, and to give to a *bona fide* possessor compensation for his improvements, yet the complainant was not entitled as against Pickett's heirs to any decree, because the interest which he sets up in equity originated after the litigation began between Bramblett's heirs and Pickett's heirs, being but a mere equity asserted under Pickett's title (not under an adversary patent), it is concluded by the decree in that cause, and his settlement and improvements being made under such an interest, and after full knowledge of the pending litigation, he has no claim to be considered as a possessor *bona fide*.

Decree affirmed, with costs.

The position assumed in this case, that a sub-purchaser, in whole or in part, is entitled to specific performance, is a mere dictum. In *Hancock's Heirs v. Hancock*, 1 T. B. Mon. 121 [15 Am. Dec. 92], the court held that the covenantor, to convey land, cannot be compelled to convey a part of the premises to the grantee of his covenantee.

MORRISON'S ADMINISTRATOR v. BECKWITH.

[4 T. B. Monmon, 73.]

ESTOPPEL FROM ASSERTING EQUITY.—If the maker of a note induces another to purchase it, on the promise that it shall be paid, he is thereby estopped from asserting against such purchaser any equity he may have had against the original payee.

ASSIGNEE OF A NOTE FOR THE PURCHASE-PRICE of land cannot be required, as a condition of its collection, to give bond as security of the title.

PURCHASER RESTRICTED TO HIS COVENANTS.—One who accepts a conveyance with covenants for title, upon which he has an adequate remedy at law, cannot enjoin the assignee of a note for part of the purchase-price, because of an incumbrance, without asking a rescission. The rule is otherwise if the grantor has become insolvent; but if he were insolvent at the time of the sale, and the purchaser knew this, and relied upon covenants running with the land and contained in prior conveyances, he is not entitled to any injunction.

CONTRIBUTION TO DISCHARGE A MORTGAGE.—If all the mortgaged premises are sold to different persons, in separate parcels, they must contribute to the payment of the mortgage according to the value of their several parcels when it was executed; but if the mortgagor retains any part of the premises, that part must first be subjected to the mortgage before resort can be had to the purchasers or to the parts sold.

COMPELLING MORTGAGOR TO GIVE SECURITY.—A mortgagor who sells part of the estate and refuses to pay or secure a balance due on the mortgage may, by the assignee of a note given to him for part of the purchase-price of the lands sold, who has been enjoined from its collection, be

compelled to give security on the balance of his estate, for the sum remaining due on the mortgage. And when such security is given the injunction against the collection of the note will be dissolved.

ERROR to the Shelby circuit. Bill in chancery. The opinion states the case.

Triplett, for plaintiffs.

Mayes, for defendant.

By Court, **MILLS, J.** John and Upton Beckwith exhibited this bill to be relieved against two judgments at law, of five hundred dollars each, obtained against them by the plaintiff in error, Churchill, on two notes executed by them to Hugh Morrison, one of which was assigned to Churchill directly, the other was assigned by Morrison to Levi Taylor and by him to Churchill. The injunction was dissolved, pending the bill, as to both these judgments, and was reinstated as to one of them by two of the judges of this court, and on final hearing it was dissolved as to that also; but by the decree Churchill was not allowed to take out execution until he entered into bond in the clerk's office, with surety approved by the clerk, conditioned to refund the money if the lot for which the notes were given was ever lost or taken away by any claim superior to that sold and conveyed by Morrison to the Beckwiths. To reverse this decree, Churchill has prosecuted this writ of error.

We need say nothing of the decree as it respects one of the notes and judgments, as in this Churchill has been successful, and was entitled to be so, because it is shown that he purchased that note from Morrison under a full assurance from the Beckwiths that it should be paid, and it has been so often held that the obligor or payor of a note may bar any equity which he may have against the obligee, by inducing the assignee to purchase it, or by first flattering him with assurances that it would be paid, that it is now unnecessary to cite authorities to prove the doctrine. Besides, of this part of the decree Churchill cannot and does not complain.

The equity by which the payment of the second and last note is resisted, is the question which claims our attention. Various grounds are stated in the bill, but all except one is controverted by the answer, and not made out in proof, and therefore they need not be noticed. This one is simply this: The note was given by Beckwiths to Morrison as one, and the last installment due for a lot of ground in Louisville, the title of which lot had been conveyed by Sarah Beard to Fortunatus Cosby, and from

Cosby transmitted by sundry mesne conveyances to Morrison, and by Morrison to the Beckwiths; and in this last sale it was estimated at two thousand five hundred dollars or three thousand dollars. The prices at which it passed in previous sales do not appear, nor by what kind of warranty. When Sarah Beard conveyed it to Cosby, it was part of a large estate conveyed at the same time, the whole of which, together with the other estate, was forthwith mortgaged to her by Cosby to secure the purchase-money. The representatives of Sarah Beard, she having departed this life, and Cosby, who are made parties to this suit, both acknowledge that this mortgage is discharged, except a small sum, perhaps not quite equal to the note now in contest. This sum, Cosby says, he would have paid, but Sarah Beard's representatives declined to receive it until the event of some contest about the estate, or part of it, depending in the federal court is determined; and Mrs. Beard's representatives likewise allege that they have concluded not to receive it, and thus the mortgage for this small balance is suffered to sleep between them. To guard against the consequences of this, Churchill was not allowed execution until he executed his bond of indemnity.

It is evident that the decree cannot be right. For upon what principle Churchill, who was no party to the contract between Morrison and the Beckwiths, could be forever kept from his money, unless he would bind himself for the title sold by Morrison, is hard to be discovered. He is but the holder of the note as assignee, claiming money first from the makers of the note; and, secondly, from his assignor, and by the decree he is forever barred from doing either. A perpetual injunction would be a preferable attitude; and we conceive that Churchill might sustain his writ of error to reverse the decree, even if the inevitable consequence were a perpetual injunction. But it is insisted that no injunction, either perpetual or temporary, ought to be granted, because the contract of Morrison with the Beckwiths has been executed on the part of Morrison, and that Morrison has conveyed with a covenant of warranty and seisin, and therefore the Beckwiths ought to be compelled to rely on their remedy on the warranty, and not to detain any part of the purchase-money, and that as their bill does not seek to rescind the contract, they ought not to be allowed to stop its progress. It is true the bill does not seek to set aside the contract, and we readily concede that they ought not to be allowed to keep the estate and money both, unless under special circumstances,

and for other purposes, their bill can be sustained on other grounds. We also admit that equity, in general, will not grant relief when the contract is executed by warranty. The grantee must then be compelled to rely upon it, instead of contesting the payment of the purchase-money.

But the bill in this instance charges that Morrison is dead and insolvent, and his estate is wholly unable to remove the lien or incumbrance, or remunerate his grantee in case the estate is lost. In such case it is competent for a vendee to go into equity, without intending to rescind the contract, to procure the appropriation of the purchase-money to removing the incumbrance, and on this ground alone can this bill be held tenable. The answer of Churchill admits the insolvency of Morrison, and contends that he was known to the complainants to be so at the date of the contract, and that the estate was sold to pay his debts, and the complainant did not then rely upon his warranty, but on that of the previous grantors, which was assigned by Morrison's grant, the grantors in which are amply solvent. If this defense were made out in proof, it might be availing, but the conveyances from these men are not filed, their situation is not shown, nor is there any proof of Morrison's embarrassment when he sold to the complainants.

As the complainants have *prima facie* shown a ground for coming into a court of equity, the question remains, what relief is to be granted? Is a perpetual injunction the proper relief? We conceive not. If that is granted, the complainants may forever keep the estate, and also that part of the purchase-money. The proper redress must be to awaken the mortgage from Cosby to Sarah Beard, and to remove its effects from the estate in controversy. If that can be done without the application of the money in contest, then Churchill will be entitled to a dissolution of the injunction; but if a part of this money is necessary to remove the burden, then the complainants can be entitled to relief as to such part only, not by being discharged from the payment of it, but by directing its payment for their security. By inspecting the mortgage, it will be seen that the estate mortgaged is a large one and the price considerable, and all but a small sum is now paid. It is a well known principle that a mortgage binds every part of the land it covers, and each spot is subject to its operation, and when it is made to bear on purchasers of different parcels from the mortgagor, they are bound to contribute only in proportion to the value of the share that each holds, fixing that value at the date of the mortgage:

Stevens v. Cooper, 1 Johns. Ch. 430 [7 Am. Dec. 499]. It is also a correct doctrine that as between these purchasers and the mortgagor, if he holds a proportion of the estate himself, such portion must first be subjected entire. If it discharges the demand, the purchasers are clear; if it does not, then they must contribute proportionably to make up the residue. Now, it seems more than probable, even if Cosby has sold the whole estate mortgaged by him, so that the balance due from him must fall on every part equally, that the proportion of that balance, which will fall to the share of the complainants, will not be nearly equal to the sum which they have in their hands, now claimed by Churchill. But if Cosby has not parted with the whole estate, but still retains a portion thereof, that portion may be more than equal to the discharge of the balance due on the mortgage; and these facts must be ascertained before it can be clearly perceived what redress is to be given to the complainants.

The proper mode to ascertain this is to direct an account to be taken by a commissioner of the sums paid and balance due on the mortgage between Cosby and Mrs. Beard's representatives, showing the true balance; also of the value of the whole estate mortgaged at the date of the mortgage, and of the part sold by Morrison to the complainants, so that the proportion of the mortgage-money chargeable thereon may be clearly seen. By the same proceeding it must be ascertained whether Cosby has sold the whole of the estate mortgaged by him, and to whom, or whether he still retains a portion thereof, and of what value. By the same commissioner it may be ascertained whether Sarah Beard's representatives still refuse to receive the money from Cosby, or Cosby declines paying it. If they receive and he shall pay or secure it, then there will be no further obstacle to the dissolution of the injunction. If the obstruction is not thus removed, and Cosby shall retain at this time a portion of the estate, amply sufficient to discharge the balance due, and he will not otherwise indemnify the complainants, then he must be compelled to execute to the complainants a mortgage on the estate so retained by him, defeasible on his paying the balance due to Sarah Beard's representatives, and keeping them indemnified from that incumbrance, and in either of these events, the injunction against Churchill must be dissolved.

But if it shall be ascertained that Cosby has sold the whole of the estate mortgaged by him, then the proportion of the

balance due, which is chargeable to the estate now in contest, must be decreed to Sarah Beard's representatives, and the injunction of the complainants must be dissolved as to the residue. It might be equitable to decree the amount for which the injunction shall be perpetuated in this event in favor of Churchill against Cosby, as he would be entitled to stand by substitution in the place of a purchaser from Cosby. But this can not be granted to him in this suit, as he has not interpleaded with Cosby, or shaped his defense in such a manner as to entitle him to a decree against his co-defendants. His claim in this respect must, therefore, be left to some future mode of redress. We shall barely remark that in making the assessment, and inquiry into facts directed by the court to the commissioner, it will be proper that the commissioner should be authorized to receive such legal evidence touching the matters of inquiry as either party may produce, and also to apply by appropriate interrogatories to the consciences of either party concerned, to be answered on oath. It will be easily seen that in making of this valuation, and assessment of the ratio of contribution, the whole purchasers under Cosby will become necessary parties, or they will not be bound by the valuation or the proportionate contribution assessed on their respective shares. It, therefore, will be expedient to direct the commissioner first to ascertain the balance due on the mortgage, and whether it has been or could be extinguished by the payment of Cosby, or any indemnity herein directed to be given to the complainants by him, and if this can not be done, and the necessity of making the assessment on all the purchasers can not be avoided, then the complainant's bill must be dismissed without prejudice, unless he shall in a reasonable time bring all the present holders of the estate sold by Cosby before the court.

The decree must, therefore, be reversed, with costs, and the cause be remanded for such decree and proceedings to be therein had, as may not be inconsistent with this opinion.

BIBB, C. J., absent.

CONTRIBUTION AMONG PERSONS HOLDING LANDS AFFECTED BY MORTGAGE.—When the estates of two or more persons are affected by a common mortgage, or other incumbrance, which one of them pays for the benefit of all, it is a well established rule of equity that he who thus redeems may hold the whole estate until the others pay their proportion of the sum paid for the redemption; or he may enforce his right to contribution from them, by suit in equity: *Chase v. Woodbury*, 6 Cush. 143; *Gibson v. Crehore*, 5 Pick. 146; *Swaine v. Perrine*, 9 Am. Dec. 318; *Briscoe v. Power*, 85 Ill. 420; *Allen v. Clark*, 17 Pick. 47. In *Allen v. Clark*, *supra*, Wilde, J., says: "The founda-

tion of contribution is a principle of justice and equity; and where there is equal equity, and there is an incumbrance on land belonging to different parties, they ought each to contribute towards removing it."

EQUALITY OF EQUITY NECESSARY IN ORDER TO ENFORCE CONTRIBUTION.—But in order to entitle such parties to a *pro rata* contribution they must stand upon the same equal ground. If, therefore, the mortgagor, after having conveyed the whole, or a part of the mortgaged premises, by warranty deed, himself satisfies the mortgage debt, he is not entitled to contribution from his grantees, for he has only paid a debt of his own which he was by his covenants bound to discharge. For the same reason the portion of the land held by the mortgagor must be first subjected to the payment of the debt: *Bates v. Ruddick*, 2 Iowa, 423; *Mobile etc. Co. v. Huder*, 35 Ala. 713; *Cumming v. Cumming*, 3 Ga. 460; *Niles v. Harmon*, 80 Ill. 396; *Iglehart v. Crane*, 42 Id. 261; *Johnson v. Williams*, 4 Minn. 260; *Cheever v. Fair*, 5 Cal. 337; *Wallace v. Stevens*, 64 Me. 225; *Lyman v. Lyman*, 32 Vt. 79. And the heir of the mortgagor occupies the same position, for as the court says, in *Harbert's case*, 3 Coke, 11: "If a man be seised of three acres of land, and acknowledges a recognizance, or a statute, etc., and enfeoffs A. of one acre and B. of another, and the third descends to his heir; in this case, if execution be sued only against the heir, he shall not have contribution, for he comes to the land without consideration, and the heir sits in the seat of his ancestor." If the mortgagor make two or more deeds of different parts of the mortgaged premises simultaneously, to different grantees, each of them will be bound to contribute, for they stand upon an equal footing as regards the incumbrance: *Adams v. Smilie*, 50 Vt. 1; *Chase v. Woodbury*, 6 Cush. 143. But if, as in the latter case, one of two such grantees neglects to put his deed on record, and the other, after recording his deed, conveys to a third person, who has no notice of such unrecorded deed, he will not be liable to contribute to the payment of the mortgage; but the half of the property, which, so far as appeared from the record, still remained in the hands of the mortgagor, will be primarily liable to the payment of the whole debt.

WHEN THE MORTGAGOR HAS CONVEYED TO DIFFERENT PURCHASERS AT DIFFERENT TIMES.—The courts of Kentucky and Iowa hold that where several parts of a mortgaged estate are conveyed in distinct parcels to different persons at different times, the several owners must contribute according to the value of their portions of the property: *Bates v. Ruddick*, 2 Iowa, 423; *Massie v. Wilson*, 16 Id. 390; *Griffith v. Lowell*, 26 Id. 226; *Barney v. Myers*, 28 Id. 472; *Dickey v. Thompson*, 8 B. Mon. 313; *Burk v. Chrisman*, 3 Id. 50; *Poston v. Eubank*, 3 J. J. Marsh. 45; *Hughes v. Graves*, 1 Litt. 317; see, also, Story's Eq., sec. 1233, d. In *Bates v. Ruddick*, the court thus present the arguments in favor of the rule adopted by them: "When we come to settle the question, however, as between two grantees purchasing different parcels of the incumbered premises, at different times, there is no more moral obligation on the one to pay than the other. Both of them have purchased premises that are alike affected by a lien, which neither created or undertook to pay. The purchased premises are liable to be sold, because of the failure of their grantor to discharge his undertaking, and not because of any failure on their part. In such cases, their interest is common, their rights are equal, and there should be equality of burden. It is difficult for us to see why the last purchaser, any more than the first, sits in the seat of the grantor." And, in *Dickey v. Thompson*, Marshall, C. J., says this rule "has, by repeated recognition and announcement from this court, acquired the character and weight of a rule of property."

But although this rule is firmly established in the two states above referred to, in most, if not all, of the other states, after some fluctuation in the earlier decisions in New York, Massachusetts, Pennsylvania and Ohio, a different one has been adopted. The rule in such cases, first laid down by Chancellor Kent in *Gill v. Lyon*, 1 Johns. Ch. 447, is, that where each subsequent purchaser has actual or constructive notice of each prior conveyance by the mortgagor of portions of the premises, the mortgagee must sell the land in the inverse order of its alienation, so that the portion last conveyed shall be first applied to the satisfaction of the mortgage. This rule was approved in the following cases in New York: *Clowes v. Dickenson*, 5 Johns. Ch. 235; S. C., 9 Cow. 403; *Steel v. Spraker*, 8 Paige, 182; *Guion v. Knapp*, 6 Id. 35; *Gouverneur v. Lynch*, 2 Id. 300; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Chapman v. West*, 17 N. Y. 125; *Ingalls v. Stockman*, 10 Id. 178; *Howard Ins. Co. v. Halsey*, 8 Id. 271. And the current of American authority seems to be almost uniform in its favor: *Mobile etc. Co. v. Huder*, 35 Ala. 713; *Cumming v. Cumming*, 3 Ga. 460; *Niles v. Harmon*, 80 Ill. 396; *Iglehart v. Crane*, 42 Id. 261; *McCullum v. Turpie*, 32 Ind. 146; *Day v. Patterson*, 18 Id. 114; *Shepherd v. Adams*, 32 Me. 63; *Holden v. Pike*, 24 Id. 427; *George v. Wood*, 9 Allen, 80; *Sager v. Tupper*, 35 Mich. 134; *McKinney v. Miller*, 19 Id. 142; *Johnson v. Williams*, 4 Minn. 260; *Brown v. Simons*, 44 N. H. 475; *Hill v. McCarter*, 27 N. J. Eq. 41; *Mount v. Potts*, 23 Id. 188; *Com. Bank of L. Erie v. W. R. Bank*, 11 Ohio, 444; *Cary v. Folsom*, 14 Id. 365; *Nellons v. Truax*, 6 Ohio St. 97; *Cowden's Estate*, 1 Pa. St. 267; *Warren v. Sennett*, 4 Id. 114; *Carpenter v. Koons*, 20 Id. 222; *Meng v. Houser*, 13 Rich. Eq. 210; *Miller v. Rogers*, 49 Tex. 398; *Root v. Collins*, 34 Vt. 173; *Lyman v. Lyman*, 32 Id. 79; *Jones v. Myrick*, 8 Gratt. 179; *Conrad v. Harrison*, 3 Leigh, 532; *Aiken v. Milwaukee & St. P. R. R. Co.*, 37 Wis. 469; *Worth v. Hill*, 14 Id. 559; *Nailer v. Stanley*, 13 Am. Dec. 691, and note. The reason of the rule is thus ably presented by the court in *Niles v. Harmon*, 80 Ill. 396: "Where the owner of land mortgaged conveys a portion of it with warranty, it is his duty to protect the grantee against the mortgage, and, in foreclosing the mortgage, it is just and right that it should be satisfied, if may be, out of the portion of the land which remains in the mortgagor, and that it should be first charged with the debt. This protects the interest of the purchaser of the part, and makes the mortgagor but pay his own debt out of his own land. It saves such purchaser from loss and injury, and does no harm to any one else. And should the mortgagor convey the portion remaining in him to a second purchaser, he takes the land as it was in the hands of the mortgagor, subject to the equity of being first charged with the payment of the mortgage-debt, and it is thus equitable that the portion of the land held by the second purchaser, should first be sold for the satisfaction of the debt, before resort is had to the land of the first purchaser."

KIBBY v. CHITWOOD'S ADMINISTRATORS.

[4 T. B. MONROE, 91.]

CONTRACT IN WRITING NEED NOT BE ALLEGED.—In assumpsit for the price of land sold, the complaint need not allege that the contract was in writing.

DEBTS OF DECEDENT.—The power of the legislature to provide for the sale of the property of a decedent to pay his debts is unquestionable.

SPECIAL ACTS AUTHORIZING the sale of the lands of infant heirs to pay the debts of their ancestor are constitutional.

ASSUMPSIT. Appeal from the Greenup circuit. The opinion states the case.

Triplett, for plaintiffs.

Barry, for defendant.

By Court, **MILLS, J.** The administrators of John R. Chitwood brought this action of assumpsit against the appellant in the court below and declared in four counts; to the whole of which the appellant severally demurred. The demurrers were overruled, and a writ of inquiry awarded, and judgment was rendered against him on the assessment of damages; and to reverse it he has appealed.

No other questions present themselves, except those which arise from the face of the declaration. The counts are all nearly the same in substance; or at least agree in the material facts, which are as follows: An act of the general assembly, passed on the fourteenth of December, 1821, entitled "an act for the benefit of the widow and heirs of John R. Chitwood," authorizing his administrators to sell, at public auction, certain pieces or lots of land at a credit fixed by the act, taking bond and security for the price, and directing them, together with the widow of the decedent, to convey the land, and that the conveyance should pass the legal estate; that the sale should be made for the purpose of paying the debts of the decedent, and the price of the land should be so applied by the administrators, and if any balance remained in their hands it should be distributed as other assets, they first giving bond and security in the county court for the due execution of the duty and trust imposed on and confided to them by the act.

They aver that they complied with all the requisitions of the act, and after proper notice, exposed to sale, by auction, one of said lots, and the appellant became the purchaser, being the highest bidder, at the credits directed by the act; that he failed to give bond and security agreeably to the terms of the sale; that they, in conjunction with the widow of the decedent, executed and acknowledged and tendered to him the conveyance in due form, but that he refused to complete the contract, and to execute his notes with security according to the act, and terms of the sale. In one or more of the counts they aver that they actually conveyed; but in others they aver the tender of a conveyance, and as in the latter shape, the case is most favorable to the appellant, we shall in that form consider it.

The first ground, on which the judgment of the court below

on the demurrer is resisted is, that the contract for the sale of lands set out in the declaration is by parol, and can not be enforced by action, consistent with the provisions of the act of assembly, entitled "an act to prevent frauds and perjuries." It might be a question, whether this sale, directed by a special act of assembly, could come within the provisions of the general act. But waiving that inquiry, we come to another which precludes it; can the appellant avail himself of the act to prevent frauds and perjuries, on a demurrer to the declaration? It has been a long established rule that on a demurrer to a declaration in assumpsit, that statute could not be relied on. The reason of the rule is, that although a declaration may not show a writing, yet a writing may be given in evidence in support of the declaration, sufficient to take the case out of the statute, and, therefore, on demurrer, the court could not see that there was no writing.

The only way to get round the rule in this case is by contending that the act of assembly, passed in 1812, 1 Dig. L. K. 264, which raised unsealed writings to the grade of sealed, and requires the same action to be brought on, and the same consideration to be given to them, as if sealed, has destroyed the rule, or removed the reason for it, and that as such writings must now become the foundation of the action, in debt or covenant, and not evidence to support it, and as assumpsit according to the repeated decisions of this court, can not be maintained on them, it follows that no writing sufficient to take the case out of the statute, can be presumed to exist, as the declaration shows none, and, therefore, the exception is good upon demurrer. If the act last recited brought every writing unsealed, purporting to be an acknowledgment of a contract to the grade of a sealed instrument, there would be no escaping of this conclusion. But it is only those writings which, by a fair construction of the expressions used, stipulate "for the payment of money or property, or the performance of any act or acts, duty or duties," that can come within this act. Now it can easily be perceived that there may be writings acknowledging facts simply, and making admissions that promises and agreements have been made, which do not stipulate as the latter act requires, but may be such memorandums signed by the parties as will take the case out of the influence of the statute of frauds. They may be insufficient to base an action upon, and yet may be good evidence in assumpsit, to prove that there had been such promises. The reason, then, for not noticing the statute of

frauds upon a demurrer to the declaration, although weakened, and rendered applicable to fewer cases than it was before the act of 1812, is not destroyed and still exists, and still has its operation, and forbids an escape on demurrer by the statute of frauds.

The remaining points relied on by the appellant are, that the private act of assembly, authorizing the administrators of Chitwood to sell the lands belonging to his infant heirs, and to convey them in conjunction with his widow, is unconstitutional, and, therefore, inoperative and void, and that as he consequently could get no title to the land purchased by their sale or deed, he had a right to disaffirm the contract as not obligatory on his part. The power of directing the sale of real estate of infants, descending to, or even devised them from their ancestor, or by their testator, has frequently been exercised by the legislature of Kentucky, as will be evinced by an inspection of numerous private acts in our code. The exercise of such power has been, at least in one instance, resisted by the executive department; but has not been hitherto a subject of minute investigation in the judicial department. Indeed, these acts are so various in their natures, and different in their circumstances and objects, that no one general constitutional provision could, perhaps, embrace the whole, and many must rest on their particular circumstances, and be opposed by different constitutional provisions. In the legislative department they have not been adopted without opposition arising from constitutional objections, and it is, perhaps, a matter of regret that so many have passed that body.

One great objection to them seems to be, that the power of infants over their real estate is denied to them by the general laws of the land, and while their own volition is thus restrained, and their hands tied, these special laws dispose of their estate without their concurrence, and without permitting them to be consulted; and whether the legislature can dispose of their real estate or take it from them by laws which operate like the revocation of a grant, consistently with every constitutional provision, is a question of much importance. But, as observed, the particular circumstance of each case, and the object of the legislature in making each act, may, and ought to be considered as deciding on each of these acts. We shall proceed to consider the provisions of the one now before us. Its preamble recites that Chitwood died in debt, and considerably embarrassed, so that his personal estate would not be sufficient to pay his debts,

without selling the slaves of the estate, which would much more injure the widow and heirs than the sale of the realty. The act then directs the estate to be sold as described in the declaration; that the administrators shall dispose of the proceeds in discharge of the debts, and distribute the balance, if any, as other assets in their hands, and that the widow and administrators shall unite in the conveyance.

The power of the legislature to subject real estate to the payment of debts, can not be questioned at this day. It was adopted by this state in its infancy, and has long received the sanction of every department of the government. Such estate is not only subjected in the hands of the debtor himself, but the law has pursued it in the hands of the heirs and devisees, and made them subject to actions on contracts, in which they were not expressly bound, for the purpose of reaching the real estate to them descended or devised. After judgment against them, the officers of the law are directed to seize and dispose of it, and pass the title, either temporarily or forever, without consulting them or asking their consent to these proceedings; and that on these plain principles, that the creditor has a moral lien on all the estate of the debtor, as the fund which he has trusted; and as the constitution is adopted for the express purpose of securing to the citizens "the enjoyment of the right of life, liberty and property," the end would not be answered if the debtor should be allowed to keep the "property" of the creditor, and also the fund which he had trusted: and as the general laws reaching that fund were adopted by the consent of the community, in accordance with the objects and purposes of the constitution, every individual is estopped to say that he does not consent to this disposition of his estate for the purpose of paying his debts.

As this estate of Chitwood, therefore, was subject to his debts in the hands of his heirs, and might, by a mode already pointed out by law, have been taken from them, we conceive it was competent for the legislature to change that mode, and to direct the administrators, instead of the sheriff, to expose and convey the estate to the purchaser, and apply the proceeds in discharge of the debts. Such a proceeding might, probably, be more beneficial to the heirs, and carried with it the dower of the widow by her consent, which under the general law could not be conveyed by the sheriff. In coming to this conclusion, we wish it understood that we exclude any inference favorable to the legislative disposition of real estate for any purpose other

than an appropriation of it to debts which could reach it by the general laws of the land. Other cases must be left unprejudiced till a proper case occurs. We are aware that one objection which presents a question of acknowledged difficulty, presents itself against legislative transfers of estates without the consent of the owner, and that is, is such a proceeding within the scope of legislative authority, or is it a power belonging to other departments of government, or to individuals themselves, and not granted by our compacts to either department. This we leave, also, till a proper case occurs for its discussion, as we have seen that the power of subjecting estates to debts is within the compact, and already conceded to legislative authority.

The only plausible difficulty that could occur in the act before us on the principles upon which we have gone, is that by the general laws Chitwood's slaves were liable to his debts before his lands, and the act has caused his land to change places with the slaves and to become first subject, without consulting his children, and thus far they are placed in a worse situation than under the general law. To this we answer that we can not see on this demurrer and the face of the act that this proceeding is, in fact, more to their prejudice than the disposition of the slaves. The act expresses the contrary, and the appellant has not, by any proper plea, shown that such was not the fact. The amount of the debts of decedent is not shown. It may be sufficient to take both land and slaves, and the slaves are not exempted by the act and they may yet be sold; and it is impossible to tell that this transfer of the preference of the estate to be first subjected by the act from the infants themselves to the administrators, has taken away their rights. We know that both lands and slaves were subject, the slaves first and the lands last; but if the debts are sufficient to cover all, as all can be reached, we can not say that any constitutional right of the infants is violated, for while the act seems to suppose that the slaves may be saved, it does not pretend to screen them, if the magnitude of the debts require them to go.

Whether, therefore, this argument ought or ought not to prevail, we need not now determine. For if the appellant intended to rely upon it, he ought, by proper pleadings, to have shown the amount of the debts and that the slaves would have paid the whole, and that the legislature, by placing the lands in front, had transferred them without the consent of the heirs, and thus placed them in a situation where they must be taken

away, when, had they been left under the general laws, they could not have been touched. Such an issue might have required of us an answer to this point, but we do not meet it in the record. For if the debts are sufficient for the whole fund, and all must be taken, it is wholly immaterial which is taken first, and it was competent for the legislature to say that either might.

The judgment must therefore be affirmed with damages and costs.

BIBB, C. J., absent.

IN AN ACTION ON A CONTRACT WITHIN THE STATUTE OF FRAUDS, THE PLAINTIFF NEED NOT ALLEGE THAT THE CONTRACT WAS IN WRITING.—It is a well recognized rule of pleading, both at law and in equity, that the plaintiff, in pleading a contract or agreement required by the statute of frauds to be in writing, need not show in his declaration or bill whether such contract is written or unwritten: 1 Chit. Pl. 244; *Price v. Weaver*, 13 Gray, 272; *Champlin v. Parish*, 11 Paige, 405; *Walker v. Richards*, 39 N. H. 259; *Perrine v. Peachman*, 10 Ala. 140; *Mullaly v. Holden*, 123 Mass. 583; *Elliott v. Jenness*, 111 Mass. 29; *McDowell v. Delap*, 2 A. K. Marsh. 33; *Vassault v. Edwards*, 43 Cal. 458; *Ecker v. Bohn*, 45 Md. 278.

“At common law it was unusual and unnecessary to allege that the contract for the breach of which the action was brought, was entered into in writing:” *Wakefield v. Greenhood*, 29 Cal. 597. And it is well settled that no change has been made in the rules of pleading by the statute of frauds; so that, when a contract or agreement is declared upon generally, without stating whether it is in writing or not, it will be presumed to be in writing: *Cross v. Everts*, 28 Tex. 523; *Dawson v. Miller*, 20 Id. 171; *Doggett v. Patterson*, 18 Id. 158; *Walsh v. Kattenburgh*, 8 Minn. 127; *Livingston v. Smith*, 14 How. Pr. 490; *Martin v. McFadin*, 4 Litt. 240; *Cozine v. Graham*, 2 Paige, 177. The court in discussing this subject, in *Walker v. Richards*, 39 N. H. 259, say: “But this distinction was early established in England in relation to statute requisitions, that where an act of parliament makes writing necessary to a common law matter, where it was not before necessary, in declaring upon that matter, it is unnecessary to allege it to have been in writing, although it must be proved in evidence; but where the matter is created by an act of parliament, and required to be in writing to be available for sustaining an action, it must be pleaded with all the circumstances required by the act to render it actionable. Hence, a collateral promise which is required by the statute of frauds to be in writing, but was good at common law without writing, need not be declared upon as having been in writing. This distinction, although it constitutes an exception to the general rules of pleading, has been too long recognized, and is sanctioned by too many precedents and decisions, to be overthrown.” “And this presumption of the existence of a memorandum such as the law requires, extends throughout the whole case; so that if it does not affirmatively appear that there is no memorandum, the plaintiff will not be nonsuit for omitting to produce one, and after verdict the existence of it will be presumed:” *Browne on Stat. of Frauds*, sec. 505; *Long v. Lewis*, 16 Ga. 154; *Elting v. Vanderlyn*, 4 Johns. 237; *Cozine v. Graham*, 2 Paige, 177; *Talbot v. Bowen*, 1 A. K. Marsh. 437; *Miller v. Drake*, 1 Caines,

45; *Carroway v. Anderson*, 1 Humph. 61; *Dayton v. Williams*, 1 Doug. (Mich.) 31. When it appears from the face of the bill or declaration that the contract was within the statute, and nothing is alleged which would, in equity, have the effect to take it out of the operation of the statute, the defendant may demur. This is the doctrine of the American and later English decisions, although a different one was maintained by some of the earlier English judges: *Browne on Stat. of Frauds*, sec. 509; *Field v. Hutchinson*, 1 Beav. 599; *Cozine v. Graham*, 2 Paige, 177; *Switzer v. Skiles*, 3 Gilm. 529; *Meach v. Stone*, 1 Chipm. 182.

In Indiana, the code requires that a copy of a contract in writing which is the foundation of an action shall be filed with the complaint, and if it is not alleged to be in writing, and no such copy is filed, the presumption will arise that the contract is not in writing, and if it be such a contract as the statute requires to be in writing, the objection may be taken by demurrer: *Harper v. Miller*, 27 Ind. 277; *King v. Enterprise Ins. Co.*, 45 Id. 43.

WELLS v. WELLS.

[4 T. B. MONROE, 152.]

PROCEEDINGS ESTABLISHING OR ANNULING WILLS are *in rem* and bind the whole world. All persons interested may become parties and present proofs, either for or against the establishment or annulment of the will. WILLS MAY BE PRESENTED for admission to probate by either an executor, legatee or devisee.

WRIT OF ERROR, WHO MUST JOIN IN.—Generally a judgment or decree is an entire thing, and therefore all affected by it must join in the writ of error; but if the judgment be several in its nature, a several writ of error lies. A judgment establishing a will is several in its character, and each person affected may severally prosecute his writ of error, or all may join in one writ.

REPUBLICATION OF A WILL is not essential where the testator erases the name of one of the executors and inserts another in its place.

REVOCATION OF A WILL, so as to require a republication, does not result from the striking out of a devise, or of the name of an executor.

ERROR to the Shelby county court. A writing, purporting to be the will of George Wells, was produced in the county court of Shelby, and offered for probate by the executor therein named, at the March term, 1817. After hearing the testimony of the subscribing witnesses, the court decided the proof insufficient, and refused to record the will. At the succeeding July term, another attempt was made to prove the same will, but the court decided that the former judgment was a bar.

In the year 1822, Peyton Wells, then an infant, and one of the devisees, applied to the same court to institute new proceedings to have the same will admitted to record, but the court overruled the application on the ground that the first adjudica-

tion was a bar to such proceedings. To reverse this decision he sued out a writ of error to this court, where the decision of the county court was affirmed: 5 Litt. 273. The other facts are stated in the opinion.

Talbot and Wickliffe, for plaintiffs.

Crillenden, for defendants.

By Court, MILLS, J. This is a case on the same will which was before this court on a former occasion, as reported in 5 Litt. 273, to which reference is made. This writ of error is sued out to reverse the first order of the county court, rejecting the will, made in 1817, and fully explained in the report referred to. The defendants in error have pleaded the statute of limitations, and the plaintiffs in error have replied infancy and coverture, and the parties on this point have referred the facts, as well as the law arising thereon, to the court without a jury.

In the will there are many legatees, consisting of the children of the testator, by different wives, and only a few of them have united in this writ of error. All who have sued out the writ have brought themselves by unquestionable proof within the savings of the statute. But one of the legatees, who has a joint interest with the plaintiffs, and who has not united in the writ, is not shown to be within the saving of the act, and it is now contended that either the writ is defective and can not be sustained, because that legatee has not joined, or that if it can, it must be considered as if that legatee was joined, and that of course all are bound. The proceedings in the county court to establish and admit wills to record, can not be reduced to the rules of other legal proceedings by proper parties; and the writ of error here, in its original features, very illy suits the case, and yet it is applied to it. The jurisdiction is peculiar, and the sentence or decision, as held before in this case, is a proceeding *in rem*, and is conclusive against the world, or all who were not parties or privies. Such was the proceeding of the ecclesiastical courts in England, as to the proof of wills in matters relating to personalty, and in many of the American states as to both personal and real estate: 1 Starkie's Ev. 230. The reason given for this is that all others who have an interest may become parties, if they choose to do so; and if they become parties, each has a right to choose his attitude, either as *actor* or *reus*. Hence it was held in the former opinion in this case, that either the executor or legatee was a suitable person to present and prove a will, and in the proceeding each legatee may act either

as plaintiff or defendant. If it is the interest of one not to prove the will, he may decline it, if to prove it he may either do it, or decline it, or oppose it, as he pleases.

If, then, the persons concerned may choose their attitude in the court below, may sustain or oppose the will, or do either, it follows that they may act in the same manner in this court, and that their rights here are the same; otherwise the powers of this court could not be commensurate with that of the court of original jurisdiction, nor could the rights of the parties here be the same. There they may act as their interest or inclination leads them; here they would be compelled to act by technical rules, the reason of which did not apply to the case. Generally a judgment or decree between original parties is an entire thing, and from the entirety of the sentence arises the joint nature of the writ of error, and all affected must join. In this case the judgment or sentence is several in its nature and, therefore, a several writ of error lies, and although more than one may join yet the writ is to be treated as a several writ, and—

The expressions of the statute which save those entitled to such writ, who labor under disability, save every one who can sue the writ alone. As in this writ all are under disability, and more were not compelled to join, all who have joined must escape the bar. Even if this conclusion is not without its difficulties the contrary conclusion will leave still more. This court will be closed while the inferior courts are open to the choice of the parties as to prosecution, defense, or neutrality, in the controversy. A number of new rules must be created, settling in every controversy who must, and who must not, join in the writ; who must be plaintiffs, who defendants, and who may look on while the rest manage the contest. To form these rules we would have no principle and no guide. We had, therefore, at once, better leave it to the same rules which govern the inferior courts, and that is, the choice of each party as to his side, and deem the controversy one which, from its nature, can not compel any one to associate himself and blend his fate with others. We, therefore, conclude that the writ in this case is not barred.

This brings us to the merits of the controversy. The will is clearly proved by the subscribing witnesses and the capacity of the testator can not be questioned. It was published and acknowledged when executed at first. Some time afterward the testator sent for the writer and one of the witnesses to the will, and suggested to him his determination to change one of the executors named in the will and a desire to substitute another in

his stead. The draftsman then erased the name of that executor in the will and inserted, in the same place, the name of another individual, whom the testator chose as executor, and after this erasure and insertion there was no formal republication of the will before the same or other witnesses, according to the requisites of the statute, and this is the only ground relied on, as vacating the will.

It must strike every one who hears this statement that to make such an act a revocation of a will, once valid and well executed, is to torture the act of the testator, to speak a language directly contrary to his evident intention; and intention must always be sought for in express revocations. This erasure did not, and could not, affect a single devise or bequest, but rather confirmed them. So well settled is the law on this subject, that striking out, without republication, even the name of a devisee, after the publication of a will, has been held to be a revocation *pro tanto* only: 6 Jac. L. D. 441. Much stronger is the reason for not holding the exchange of the name of an executor a revocation. The power of the executor generally extends to the personal estate only; he may be appointed or exchanged with one witness only.

The judgment of the county court is, therefore, held erroneous, and must be reversed, with costs; the will must be admitted to record in this court as fully proved, and then remanded to the court below, there to be recorded and preserved as fully proved in this court.

BIBB, C. J., absent.

MORGAN'S HEIRS v. BOONE'S HEIRS.

[4 T. B. MONROE, 291.]

A TRUSTEE, MORTGAGEE, TENANT FOR LIFE OR PURCHASER, who gets an advantage by being in possession, and purchases an outstanding title or incumbrance, can not use it for his own benefit, but must be considered as holding it in trust for him under whose title he entered. A court of equity will, however, lend its aid to secure or reimburse all advances properly made by a trustee or agent to fortify the title.

ERROR to the Fayette circuit. Bill in chancery. The opinion states the case.

Haggin and Triplett, for plaintiffs.

Wickliffe, for defendants.

By Court, BIBB, C. J. Abijah Woods obtained from the commissioners a certificate of his right to a settlement for four hundred acres, on the waters of Boone's creek, adjoining Col. David Robinson's survey to the east, including a small sinking spring which empties into a big pond, and the pre-emption of one thousand acres. The pre-emption warrant was obtained, No. 720, in the name of Austin Eastin, assignee of Abijah Woods, entered in June, 1780, surveyed September 27, 1788, for Austin Eastin, assignee of Abijah Woods, as to seven hundred and ninety-two acres, on the ninth of December, 1788. Samuel Boone, being the proprietor of the warrant, caused the whole warrant and survey to be assigned by Austin Eastin to Charles Morgan.

On the ninth of February, 1791, Charles Morgan obtained a grant in his name, as assignee of Austin Eastin, as assignee of Abijah Woods, for seven hundred and ninety-two acres, upon the survey of 1788. On the ninth of April, 1791, Charles Morgan executed to Samuel Boone his obligation to convey to him, according to the quantity of land which Morgan should obtain, and Boone should maintain a good right to out of the aforesaid pre-emption of Austin Eastin, assignee of Abijah Woods, which had been assigned to said Morgan, a like quantity to be taken where Boone then lived out of Morgan's claim of one thousand three hundred acres, and the deficiency made up in the lands of equal quality on the waters of Licking, within fifteen miles from where the trace from Stroud's station to the upper Blue Licks crosses Hinkston's fork. The title to be made as soon as it could be truly determined what quantity of land the said Morgan had a good right to in the assigned pre-emption.

On the same day, Boone, by his writing, also under seal, reciting Morgan's bond to Boone, agreed with Morgan to discount ten acres of land, which Boone had received satisfaction for, from Wade, and also so much land as shall be said Morgan's proportion of the surplus gained in his survey of one thousand three hundred acres, and Richard Wade's and Leonard K. Bradley's surveys included, together making five hundred acres, according to the agreement between Morgan and Bradley, and that all former contracts and writings concerning said exchange of lands between them should be void. On the tenth of January, 1795, Samuel Boone assigned Morgan's obligation to Samuel Boone, jun., and Roger Jones. On the twenty-fifth of January, 1817, the assignees, together with Leonard K. Bradley, whom Jones

and Boone acknowledge to be entitled to part of the land, exhibited their bill against Morgan, and charge that Morgan had taken possession under the pre-emption assigned to him by Boone, and obtained a patent in his own name, and had held free and peaceable possession under said patent of five hundred and twenty-one acres thereof for thirty-three or thirty-four years, that being the quantity saved of said claim; that Morgan holds but two hundred and forty-seven acres of the claim whereon said Samuel Boone was settled by Morgan, for the whole of which they claim conveyance; that Morgan has no other lands whereof to satisfy his said obligation to Boone, having fraudulently conveyed away the lands which came within the description, or if he retains any such he will not discover them.

They pray a conveyance of the two hundred and forty-seven acres, and the balance to be conveyed to Bradley, if Morgan has the lands to make up the quantity of five hundred and twenty-one acres; if not, then compensation in damages for the deficiency. Morgan denies that five hundred and twenty-one acres are saved, but only one hundred and forty acres of Wood's pre-emption, and claims the discount of ten acres and of one hundred acres or upward for surplus, according to Samuel Boone's writing bearing date even with the bond. The defendant exhibits a copy of a letter dated on the seventeenth of December, 1816, to the complainants, in which he proffers to come to a settlement and to convey the land according to his bond; as it was then clearly to be ascertained how much land they are entitled to, the dispute with the interfering claim of Robinson being settled, proposing to meet them, if not later than ten o'clock of that day, at any suitable place; and if they cannot agree, then to submit it to arbitration and enter into bond in heavy penalty to abide the award; if they fail to meet, he threatens the most extravagant demands for rent of the cleared land, at eight dollars per annum for every acre in their possession, and to sell the land, etc. The defendant also states that Robinson brought suit against him upon an interference with said Wood's pre-emption, and in that suit the court of appeals directed how the pre-emption entry should be surveyed; that he then relinquished any further controversy with the interfering claimants, where their patents were older, and yielded to such superior claims and to the settlement right of Woods; that only one hundred and forty acres of the pre-emption will be saved, to only thirty acres whereof the complainants are entitled.

July 29, 1820, Morgan filed an amended answer, by which he states that under the exchange he put Boone into possession of a tract supposed to contain two hundred and forty-seven acres, but which he has reason to believe contains about three hundred acres; that after a tedious litigation he got the opinion of the court of appeals, May 3, 1803, in printed decisions, directing the position of Woods's settlement and pre-emption, which so surveyed gives to Boone's claim one hundred and seventy-eight acres, the residue of the survey being taken by Robinson's settlement and pre-emption, Woods's settlement, and Craig's treasury warrant; that taken by Robinson's claim, appearing to have been with the consent of Boone by compromise, the portion taken by the settlement of Woods belongs to the respondent, and by the rule of decisions has the preference where the settlement and pre-emption of the same party covers the same land as here. He charges that Austin Eastin entered the pre-emption to cover the settlement; that Woods had no hand in it, and Boone claimed under Eastin; the residue taken by Craig's claims, whose grants are the elder, and from the shape given by the court of appeals to Woods's claim, it became manifest that the title of Craig was paramount for the land, outside of the figure directed for Woods in the case aforesaid, and to avoid an ejectment by Craig, that the respondent admitted his right and purchased the land, and received Craig's title on the twenty-fourth of August, 1811, which land the respondent had sold to Jacob Fishback, and purchased Craig's title to prevent Fishback from being ousted; that in the tract of two hundred and forty-seven acres there is a surplus of twenty-four and three quarters acres, which Boone by his agreement is bound to account for; which, with the ten acres mentioned in said covenant, deducted from the land saved, leaves only a balance of one hundred and forty-four and one quarter acres which this respondent has ultimately obtained under the exchange for the two hundred and forty-seven acres, but which contains three hundred acres; and therefore he prays that the complainants restore the residue, offering by his answer to convey the quantity of one hundred and forty-four and one quarter acres laid off in some reasonable shape.

It appears in evidence that on the twenty-seventh day of September, 1788, a survey for three hundred acres was made for Abijah Woods, upon his settlement, by Charles Morgan, as deputy surveyor, but it does not appear that any grant was ever obtained upon that survey to Woods, Morgan, or any one else;

that on the same day, by Charles Morgan, as deputy surveyor, and by the same chain-carriers and markers, the survey for Austin Eastin, assignee of Abijah Woods, for seven hundred and ninety-two acres, was made, including the survey of three hundred acres, made on the settlement. On the ninth of December, 1788, the survey of seven hundred and ninety-two acres was assigned to said Charles Morgan by said Eastin, and carried into grant to Morgan, the assignee; that as early as 1787 said Charles Morgan sold part of the land so surveyed by virtue of the pre-emption to Jacob Fishback; another part to Compton, and leased to Hathaway, all three of whom settled on the land in that year; that said Morgan and his vendees and his tenants have ever since held possession; that the interference between Robinson's settlement and pre-emption, and Morgan, assignee of Woods's pre-emption, was on the second of July, 1814, compromised by the owners of Robinson's claim of the one part, and by Boone and Fishback, as the agents of Morgan, of the other part, whereby a dividing line was agreed and established, and mutual releases executed, so that the quantity of five hundred and twenty-one acres of Woods's pre-emption was left to Morgan.

On the twenty-fourth of August, 1811, a deed was executed by John Craig to Charles Morgan, in consideration of one dollar for parts of Craig's grants of two hundred, two thousand, and one thousand acres, being so much thereof as interfered with the pre-emption of Woods. This deed is a mere quitclaim, expressing that Craig is not to be accountable in any way. Samuel Boone died, and his heirs were made complainants. By an amended bill, the heirs of Samuel Boone, sen., the assignor, were made parties, and answered, confessing the assignment and right of the complainants. It was also stated that said Boone died intestate, and that no administration has been granted, and Charles Morgan's heirs were made parties upon his death.

Upon the hearing the circuit judge took five hundred and twenty-one acres to be the quantity of Woods's pre-emption, saved to Morgan; he credited the ten acres agreed to be discounted, and by his interlocutor ordered a survey to ascertain the quantity of land in the tract of Morgan, which he agreed to convey to Boone, called two hundred and forty-seven acres, which surplus above two hundred and forty-seven appeared to be twenty-nine acres, making two hundred and seventy-six, to which add ten acres, gives two hundred and eighty-six acres to be de-

ducted from five hundred and twenty-one acres, leaving two hundred and thirty-five acres; for which Morgan should pay in damages, not showing that he had any land to satisfy that part of Boone's claim, according to the obligation. The damages were fixed by reference to the value of the land at the date of the obligation with interest thereon at the rate of five per cent., and a jury being impaneled, found the value of two hundred and thirty-five acres at three hundred and ninety-one dollars and sixty-seven cents, interest thereon at five per cent., to be six hundred and thirty dollars and ninety-one cents, amounting together to one thousand and twenty-two dollars and fifty-eight cents. Thereupon a final decree was pronounced that Morgan should convey to the complainants two hundred and seventy-six acres aforesaid, on which Morgan had settled Boone, and stipulated to convey, and for the residue short of five hundred and twenty-one acres, that he should pay the damages assessed and costs, from which Morgan's heirs appealed.

The great effort in Morgan's answer is to avail himself of a decree of the court of appeals, involving part of the land, in which a figure was given for the pre-emption, and by holding Boone to that, get the benefit of other claims, viz.: the settlement of Woods' and Craig's elder grants, and of Robinson's as so many losses to Boone, and gains to himself. He has not pretended any eviction by title paramount, but endeavors to show that he might possibly have been evicted, if the adverse claimants had asserted their claims in due time, and with the effect, he thinks, due to their strength, and the weakness of Woods's pre-emption. But he has never been evicted, nor sued but by Robinson; that suit ended, not in an eviction, but by a compromise, leaving five hundred and twenty-one acres of the pre-emption assigned by Boone to him untouched, and safe. As to the settlement survey of Woods, it has never been carried into grant. Morgan says he owns it. How did he acquire it? When? What did he pay for it? Nothing. As to Craig's elder grants, they never were used against the survey and entry of Woods's pre-emption, which in dignity was superior to Craig's treasury warrants. When did Morgan purchase in this outstanding legal title of Craig? In 1811, after a continued adversary possession of Morgan, commencing simultaneously with the survey for Woods, in 1788, and never disturbed by Craig. What did Morgan pay for this title? The deed says one dollar. The evidence induces a belief that Morgan did not pay

even that. Morgan does not claim to have paid anything, nor does he ask any compensation for anything he has paid in perfecting, defending, or maintaining the claim assigned by Boone. There is no evidence nor allegation that he has paid one dollar. The evidence taken is, so far as it goes, that Boone and Fishback paid the expenses of the suit with Robinson; Morgan being at a distance, and not attending to it. From 1787, down to the time of the decree, he has had the use, occupation and benefit of five hundred and twenty-one acres (and part of the time of seven hundred and ninety-two acres), assigned by Boone, while Boone has had the possession and benefit of the tract called two hundred and forty-seven acres, with the surplus of twenty-nine acres, and the ten acres, in all but two hundred and eighty-six acres.

The utmost that Morgan could be allowed in equity would be to exhibit his account and evidences of the advances made by him for the purchase of the claims conflicting with the patent under which he held, as the assignee of Boone; and thereupon to put Boone to his election to consider Morgan as his agent and trustee in making the advances, and acquiring those titles or claims of title; or if Boone would not elect so to consider him, then for Morgan to surrender the possession he acquired, and held under Boone's claim, and use those conflicting claims in warfare. It is a general principle that if a trustee, mortgagee, tenant for life or purchaser, gets an advantage by being in possession, or behind the back of the party interested, and purchases in an outstanding title or incumbrance, he shall not use it for his own benefit, and the annoyance of him under whose title he entered, but shall be considered as holding it in trust. It is sufficient for this doctrine to refer to the case of *Holridge v. Gillespie*, 2 Johns. Ch. 33, 34, in which Chancellor Kent has given references to many cases, old and new.

Morgan has not asked to be considered as trustee; he does not pretend to have paid a dollar, but wishes, as the person in possession under Boone, with a continued possession of about nine and thirty years, to set up outstanding claims never set up against him, but now united with the possession as claims superior and paramount to Boone's. A court of equity will lend its aid in reimbursing or securing all reasonable and fit advances by an agent, trustee or purchaser, to fortify the title; but will never permit or aid an attempt to betray or invalidate the title. These rules have been long settled and well

approved. They conduce to good faith, confidence and fair dealing. They preserve that equality between the vendor and vendee, as to gain and loss, by purchasing in adversary claims, which equity delights in, and has established as a maxim.

The defendant did not deny the long continued and uninterrupted possession; he did not show a willingness to convey the lands to make up the deficiency of the quantity, nor that he had lands to comply with his contract; but claimed possession of part even of the two hundred and forty-seven acres to be re-delivered. By his letter, before suit, he manifested a spirit of reluctance and evasion, which well warranted the complainants to resort to a court of equity. Neither did his answers show any disposition to comply with his contract; and therefore the costs were properly adjudged against him. For decreeing to the complainants so much of the lands engaged as Morgan could convey, and damages for the residue, which he was unable to convey, according to contract, the precedents of *McConnel's Heirs v. Dunlap's Devisees*, Hard. 41 [3 Am. Dec. 723], and *Jones v. Shackelford*, 2 Bibb, 410, will suffice.

Of the rule of compensation, the appellants have no cause of complaint.

Decree affirmed with costs.

See *Green v. Winter*, 7 Am. Dec. 475; *McClanahan v. Wells*, 12 Id. 412.

LEIGH v. EVERHEART'S EXECUTOR.

[4 T. B. MONROE, 379.]

FORGED DEED MAY IN EQUITY be decreed to be delivered up and canceled. CASES DECIDED IN ENGLAND SINCE 1776 are not authority in the courts of Kentucky, and must not be read therein.

A DEFENDANT CAN NOT BE REQUIRED TO ANSWER as to the forgery of a deed which the bill seeks to have canceled as forged.

PERPETUATING TESTIMONY OF FORGERY.—A party prejudiced by a paper alleged to be forged, may frame his bill so as only to perpetuate evidence of the forgery, or may add a prayer that the paper be surrendered and canceled.

APPEAL from the Washington circuit. Bill in chancery. The opinion states the case.

Crittenden, for plaintiff.

Hardin and Mayes, for defendant.

By Court, BIBB, C. J. Upon bill filed by Martin Everheart, executor of Martin Everheart, deceased, the court decreed against

Leigh that a release and assignment held by him, purporting to have been executed by the testator, should be delivered up to be canceled, as not the act or writing of the testator. From this decree Leigh has appealed. The other subjects of complaint, being decreed against the complainant, are not before the court and need not be stated.

In this court, two questions are made by the counsel for Leigh: 1. The jurisdiction of a court of equity to decree the release to be delivered up to be canceled upon the case stated in the bill; 2. As to the question of fact. First. The release and assignment relates to certain debts due to the testator and Leigh in Louisiana, upon an adventure as partners in a boat-load of produce, sent from Washington county in 1819, and to moneys collected, or to be collected, from that adventure, due to them, or either of them; and the paper alleged to be forged purports, for natural love and affection for his daughter Polly, the wife of Leigh, and because he had not advanced her as he had his other two daughters, to release and assign to his daughter Polly and her husband, Henry Leigh, all his interest in those moneys collected, or to be collected, and to bar all claims against them, up to the date thereof, June 2, 1821. To perpetuate the evidence of the execution of this release and assignment, Leigh had exhibited his bill against said Martin Everheart, executor, and Sarah Everheart, executrix of the testator, Martin Everheart, and against the heirs and distributees; to which the executor had answered, and depositions had been taken. To these proceedings Martin Everheart in this bill refers. As this assignment and release related to partnership debts, which were in the hands of Leigh, and properly to be collected by him as the survivor, and also to other matters concerning the interests of the plaintiff, as executor, and affecting his interest as a distributee, we think the court had jurisdiction to order it to be canceled, if void, and delivered to the executor, whose interests were liable to be affected by it. Where deeds have appeared void on their face, the decisions have oscillated as to the propriety of a decree for their surrender. Some of the chancellors, supposing that in such cases there was no ground for interfering, because the production of the instrument at law would defeat the demand upon it. Others have decreed such deeds to be delivered up, upon the ground that although they could not be useful to the party against whom the surrender is demanded, yet they might be prejudicial to the interests of the other party; they might defeat the ends of justice; they might form a cloud

upon the title or interests of the parties seeking the relief. Precedents are not wanting where deeds not appearing void on their face have been decreed to be delivered up to the party against whom they might be prejudicial. Where the deed does not appear to be void on its face, but its want of obligatory effect depends on proof *aliunde* and on collateral circumstances, there seems to be great propriety in the exercise of jurisdiction by a court of chancery, in ordering it to be delivered up.

The act of 1807, chap. 7, p. 28, enacts: "That reports and books containing adjudged cases in the kingdom of Great Britain, which decisions have taken place since the fourth of July, 1776, shall not be read, nor considered as authority in any of the courts of this commonwealth." This prohibition places decisions of such foreign courts exactly where they ought to stand, in reference to other courts, not subordinate and subject to their control. As obligatory rules, by force of authority, they have none. But so far as the reasoning and illustrations of principles, contained in those reports, can enlighten the understanding and persuade the judgment they are useful, and have been used out of court. The leading cases upon this question of jurisdiction are decided since 1776, and may be found in a note to the case of *Ryan v. McMath*, 3 Bro. Ch. c. 18—in the notes, 1 Madd. Ch. 184–187, and in Cooper's Eq. Pl.

It has been *questio vexata*, but we incline to the opinion that the jurisdiction ought to be exercised, under the regulations and terms imposed upon the complainants in analogous cases. In this case no answer to the forgery was sought from the defendant; it was waived as to that, expressly, in the bill; there was no plea nor demurrer, nor objection; but the defendant submitted to the jurisdiction, and did in fact answer, denying the forgery. In the case of the *Earl of Suffolk v. Green and others*, 1 Atk. 451, Lord Chancellor Hardwicke seems to be of opinion, that a man may bring a bill to perpetuate testimony in many cases, without waiving the penalty, or offering to pay, where he could not bring a bill for relief without waiving the penalty or offering to pay, "as in waste, or in the case of a forged deed," or in cases of insurances as to fraudulent losses, although subject to a penalty, or even felonious. As in usury, so in other cases of penalty and forfeiture, etc., the defendant may protect himself from any answer or discovery, except upon terms.

Forgery of a deed or other instrument is of itself a gross fraud upon the person whose seal or signature is forged. And there seems to be no good sense in refusing relief against this kind of

fraud, when other frauds, less aggravated, are relieved against by ordering the deeds or papers to be delivered up to be canceled. That a court will not compel an answer by way of discovery, touching the forgery, is true. But because a discovery will not be compelled, does it follow that every other relief shall be denied, when the complainant does not insist on a discovery? Why shall equity sustain a bill to perpetuate evidence touching a forged deed, and yet refuse to relieve effectually and promptly against the consequences of the fraud, the complainant not insisting on answer by way of discovery? It would seem to be at the election of the complainant to frame his bill for present and effective relief, or to perpetuate his testimony to guard against future harm; and that the jurisdiction of a court of equity is as competent to give the one relief as the other.

Upon the question of fact, we can not sustain the decree which ordered the instrument to be delivered up as a forgery. The complainant was the actor, and had taken upon himself to prove the forgery, and asks relief upon that allegation. He has not made out his case. The complainant has very ingeniously connected with his questions, as to the signature of Everheart's being genuine or forged, a comparison of that signature with the signature to the will, and the main force or strength of his testimony is derived from that comparison. The witnesses who depose to the signature as being the proper handwriting of Everheart preponderate in number, weight and effect due to the ground-work and reasons of their judgment and belief.

The decree ordering the release and assignment to be delivered up to be canceled as a forgery, is reversed, and the cause remanded to the court below, with directions to dismiss the bill, with costs.

JOHNSON v. ELLISON.

[4 T. B. MONROE, 526.]

NAME.—JUNIOR is no part of a man's name, and need not be affixed to the name or signature of a person, although he is the younger of the persons bearing the same name.

ERROR to the Fayette circuit. The opinion states the case.

Chinn and Brown, for plaintiff.

Dana, for defendant.

By Court, BISS, C. J. The petition, according to the form prescribed by the statute, sets out the note as made by the de-

fendant to James Wyatt, with an assignment by James Wyatt, jun., to John T. Jack, and an assignment from him to the plaintiff, "whereby the plaintiff has become the proprietor thereof, of which the defendant hath had due notice." The defendant demurred, and the court gave judgment for the defendant.

Junior is no part of the name of a man. It is neither the name of baptism, nor the name of his family. It is an addition to distinguish between two or more persons bearing the same name. Supposing there are two persons named James Wyatt, usually distinguished by the addition of senior or junior; the defendant has made the note to one of them; but to which, the note, on its face, does not certainly and conclusively designate. To which of the two the note was in truth made and delivered, is a question of fact; it rests in averment. That this note was made to James Wyatt, junior, is a permissible averment; there is nothing in the note to estop such an allegation. The plaintiff claims the note under an assignment by James Wyatt, junior, whereby he alleges "he hath become the proprietor;" this is equivalent to and includes an averment that the note was made to James Wyatt, junior. If the senior were to sue, and allege the note made to him by the name of James Wyatt, the defendant might defeat the action by showing the note was to James Wyatt, jun.; this action has been defeated below because the plaintiff claims under the junior, and has averred, in substance, that the note was made to him. Thus, the senior could not recover, because the note was made to the junior; and the junior has not been permitted to pass his title to the note by the judgment in this case, because the note does not express on its face whether it was made to the senior or to the junior.

It is a question of identity as to the right owner of the note, which can not be raised upon demurrer. The junior was the holder, and indorsed it over; the plaintiff alleges that, under that indorsement, he has become the proprietor; the demurrer admits the title of the plaintiff to the note. Yet the court gave judgment against the plaintiff.

Judgment reversed, with costs; cause remanded, with leave to defendant to withdraw his demurrer and plea, otherwise judgment to be entered for plaintiff on the demurrer.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

DUBREUIL v. SOULIE.

[4 MARTIN, N. S. 91.]

MISREPRESENTATION, ESTOPPEL BY.—A defendant in execution who points out property as his own, to be sold under the writ, and purchases it at the sale, is estopped from thereafter asserting that the property belonged to another.

APPEAL from the court of the third district. The opinion states the case.

De Arnas, for plaintiff.

Dennis, for defendant.

By Court, PORTER, J. The plaintiff prayed for an injunction against an execution, issued on a twelve months bond, given for the six town lots sold to satisfy a judgment in favor of the defendant, as syndic of Tanneret and Gourgon, against the plaintiff and his wife, Eliza B. Dubreuil. The grounds on which the writ is asked for are, that the sheriff had not made him a conveyance, and that the property belongs to the minor children of his wife.

The defendant pleaded the general issue, and the court, on hearing the parties, being of opinion the plaintiff had failed to make out his case, dissolved the injunction, from which judgment he appealed. The cause has been submitted without argument.

The evidence spread on the record shows that the present plaintiff was one of the defendants in the suit under the judgment rendered, in which this property was sold; that at the sale he became the purchaser thereof; and that the very property to

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which he now complains he has not got a good title, was pointed out by himself to the sheriff. Putting his case, therefore, on the best footing, he deceived the officer and the original plaintiff by designating property which did not belong to the defendants. After doing this, he has no right to claim the equitable interference of a court of justice; more particularly as the only consequence that would result from his obtaining it, would be to leave him responsible on the original judgment. His case, in fact, is nothing else than a complaint that he has sustained an injury by having paid his debt with the property of others.

An appeal taken from a judgment, which most justly and legally refused to sustain such a pretension, can have had no other object but vexation and delay.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs and ten per cent. on the amount of the execution for the delay occasioned by this appeal.

One who points out property to be sold under execution as the property of the defendant therein, is thereby estopped from subsequently asserting that the title was in himself: *Wells v. Higgins*, 13 Am. Dec. 235, and the note thereto. The rule is equally applicable to one who without objection sees his own property sold as that of another person: *Engle v. Burns*, 2 Am. Dec. 593; *Storrs v. Barker*, 10 Id. 316.

MORGAN v. FURST ET AL.

[4 MARTIN, N. S. 116.]

ESTOPPEL BY GIVING BOND TO RELEASE ATTACHED PROPERTY.—A person who binds himself to hold the proceeds of certain property subject to the order of court, and thereby obtains the release of an attachment, and the possession of the property attached, is estopped from denying that the sheriff had a right in the property attached.

APPEAL from the court of the first district. The opinion states the case.

Strawbridge, for plaintiff.

Hoffman, for the defendants.

By Court, MARTIN, J. The plaintiff states, that having levied an attachment, as sheriff, on a quantity of tobacco stems, the defendants obtained the release of it, on giving bond to hold it or its proceeds subject to the judgment of the court; that the plaintiff in the attachment had judgment therefor, and the defendants refused to deliver the tobacco or proceeds.

The answer denies the plaintiff's legal or equitable interest in the tobacco, and, consequently, his right of action, and avers that the tobacco was the property of Reynolds, and, before attached, was purchased from him by Furst, under an agreement that it should be shipped to Hamburg, on the joint account of Furst and Reynolds, and that a part of it was already on board at the time of the attachment; that the amount of the half was six hundred and thirty-one dollars, of which Furst has paid three hundred and six dollars, for storage on the whole, at the request of the plaintiff in the attachment, who knew all this and agreed to the shipment; that, by the last accounts, the tobacco could not be sold at Hamburg for costs and charges.

There was judgment for the plaintiff, and the defendants appealed. The statement of facts shows, that the parties agreed, on the tobacco being attached in the suit of *Clark v. Oddie*; that on Furst giving bond in the penalty of nine hundred and fifty-seven dollars, to abide the decree of the court, the tobacco should be delivered to him. Oddie having failed, and Clark being appointed his syndic, the latter obtained a rule on Furst, to show cause why he should not be ordered to pay the proceeds of the tobacco to him, for the benefit of the mass. The rule was, no cause being shown, made absolute for the payment of the penalty in the bond. The property attached was, by the final decree of the court in the case of *Clark v. Oddie*, decreed to be sold for the payment of the creditors, the intervening claimant (Reynolds), under whom the present defendants claim, having withdrawn his claim.

Devance, a witness for the defendants, deposed that he is Furst's clerk, and heard a conversation between Furst and Reynolds, in which it was agreed that one hundred and eighty hogsheads of tobacco stems should be shipped to Hamburg for their joint account; that after shipping a part of the tobacco, the whole was attached by Clark as Oddie's property, and afterwards Clark and Furst agreed the shipment should go on according to the agreement, and Furst should give bond for the tobacco at three fourths of a cent per pound, and account for the proceeds to whoever should be deemed the owner; and accordingly Furst gave his bond for the value of the tobacco, rating it as above, and deducting the storage. At the time of this agreement, the tobacco was in Reynolds's possession, and was delivered to Furst to be shipped, and he was always willing to pay the difference between six hundred and thirty-one dollars and three hundred dollars. He has not yet received an ac-

count of sales from Hamburg, and according to the last letters the tobacco was still on hand. The witness has access to Furst's correspondence, and knows the situation of the tobacco.

On the cross-examination the witness declared he was present at a conversation between Clark and Furst, the particulars of which he does not recollect. He derives his knowledge of the agreement he has stated from Furst; he recollects the former telling the latter not to buy the tobacco, as he, Clark, claimed it. This was after the agreement between Furst and Reynolds. The half of the tobacco, at the rate specified, amounted to six hundred and thirty-one dollars, and Furst paid three hundred dollars for storage on the whole; according to the agreement between Reynolds and Furst, the latter was to take one half of the tobacco at three fourths of a cent per pound, and advanced the value of the other half at the like rate, and accounting for the proceeds.

Reynolds, a witness of the plaintiff, deposed: His agreement with Furst was substantially as stated by the preceding witness. Furst, after the shipment, offered to take the whole tobacco on his account, paying for the second half at the same rate as for the first, the money remaining in the sheriff's hands, subject to the decision of the court. The witness consented to this, and it was accordingly so done. On the cross-examination this witness declared he did not know Clark in the agreement made with the defendant. The note given by witness to Spicer, for the tobacco, is still out and unpaid, and the witness has not received anything for the tobacco.

The counsel for the defendant urges that the bond sued on is not one given by the defendant in an attachment case, according to the statute: *Martin's Digest*; *vide* Attachments. That the defendant had acquired an interest in the property before the attachment was laid on it; the bond was therefore taken on the understanding of the parties, that he should send the property to market and account for the proceeds, as appears from the condition. To compel the defendant to pay the value is to force a sale on him.

There is no proof of notice of the judgment to the defendant, neither was he required to bring the proceeds of the property into court. The plaintiff's counsel urges that the objections to the form of action was waived below by the pleadings, and can not avail here: *Duchamp v. Nicholson*, 2 Mart. N. S. 672. That the agreement filed in *Clark and Oddie*, shows notice to Furst of the decree, and puts him *en demure*, if necessary, which

is not the case, as the plaintiff now demands the value or amount of the property, which is the exact amount of the penalty, fixed by the court at one thousand two hundred dollars, but reduced by the agreement of the parties to what Furst's answer shows to be the real debt: *Bryan v. Cox*, 3 Mart. N. S. 574. That on the merits the testimony of the first witness is of no weight, for he informs us he derives his knowledge from the defendant as hearsay; and Reynolds deposes, the latter took the property on his own account; it was worth one thousand two hundred and sixty-two dollars; he had paid three hundred and six dollars for storage, and the balance was nine hundred and fifty-six dollars, for which judgment is prayed.

We think the defendant, having given his bond to the sheriff, who delivered him the property attached, cannot urge that the plaintiff has neither legal nor equitable interest. The defendant has given him by his deed a legal right, and the delivery of the goods raises an equity; in whatever mode a party binds himself he is, by our law, bound. The defendant cannot avail himself of any right on Reynolds while he admits the latter withdrew his claim; neither can he urge property in himself, after having bound himself to hold the proceeds to the order of the court. The proceedings in the case of *Clark v. Oddie* clearly show notice of the decree and a demand on Furst. The testimony of Reynolds establishes Furst's liability for a fixed sum, which he bound himself to pay.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

BALDWIN v. GRAY.

[4 MARTIN, N. S. 192.]

PARTNERS, LIABILITY OF.—The liability of partners on a contract entered into with a third person, is governed by the *lex loci contractus*.

JOINT OBLIGATION—EXTINGUISHMENT OF.—A receipt to a co-debtor for his part extinguishes the obligation *in solido*.

APPEAL from the court of the first district. The opinion states the case.

McCaleb, for plaintiff.

Whittlesey, for defendant.

By Court, PORTER, J. The facts in this case do not appear to be controverted, the only matter disputed is the legal obliga-

tions which arise on them. The plaintiff was agent for the steamboat Fayette, of which the defendant was part owner. This action is instituted to recover the amount of an appeal bond, given in an action, wherein the owners of this boat were defendants, and also for moneys paid for the expenses of the boat while in this port. It is insisted the defendant is liable *in solido* because the contracts by which he became interested in this vessel was entered into at Pittsburgh, in the state of Pennsylvania, where the common law prevails. This law governs the obligation of the partners with each other, but not with third persons. It can no more affect the rights of those who contract with them in a different country, than particular stipulations between the partners could. The contract entered into in the case before us, was made in this state, and must be regulated by the *lex loci contractus*. This is the general rule, and we know of no exception to it, unless the agreement is in respect to land in another country, or the performance is to be in another state. A foreigner coming into Louisiana, who was twenty-three years old, could not escape from a contract with one of our citizens by averring that according to the laws of the country he left, he was not a major until he reached the age of twenty-five.

We think, therefore, that the defendant is only liable for his virile portion of the moneys laid out and expended on the steamboat Fayette: *Caroll v. Waters*, 9 Martin, 500.

In relation to the appeal bond, it seems to be conceded the defendant is liable *in solido*, unless there has been a severance of the judgment. The evidence of this, it is contended, is presented by a letter of the plaintiff to the defendant in the following words:

“New Orleans, August 8, 1823. Mr. J. F. Gray. Dear Sir: In consequence of the late judgment here against the Fayette, of which I informed you under date of the twenty-seventh ultimo, I have to request you to pay over to Wilkins, McIlvaine & Co., immediately, seven hundred dollars, being your proportion of the whole amount of debt. Your early attention to this is respectfully solicited because of my having drawn on them for the gross amount. (Signed.) J. Baldwin.”

Payment of this sum was made as requested, and McIlvaine & Co. gave a receipt in full of “Mr. Gray’s separate account with Joshua Baldwin, as furnished us as one of the owners of the steamboat Fayette.”

There can be no doubt that the expressions used in this letter and the receipt extinguish the obligation which the defendant

owed *in solido*. When a receipt is given a co-debtor for his part, it is an acknowledgment that he is not bound jointly and severally, it being inconsistent that a person should be a debtor for a part and a debtor for the whole: *Pothier des Obligations*, No. 277; *Toullier Droit Civil Francais*, vol. 6, liv. 3, tit. 3, cap. 4, No. 741; Civil Code, 280, art. 111.

The language used in a subsequent letter of the defendant, by which he states that "Mr. Anderson will pay the balance of the account, and if not, they must," has been relied on as restoring the obligation *in solido*. We think the expression can only be considered as a recognition of the previous obligation, by which each were only responsible for a part, and that the parties did not contemplate a new obligation.

There is no foundation for commissions charged on moneys paid on the appeal bond and for costs.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed that the plaintiff do recover of the defendant the sum of one hundred and eighty dollars sixty-nine cents, with interest from judicial demand, the costs in the court below, and that the appellant pay the costs of the appeal.

THAT A CONTRACT IS GOVERNED, and its validity determined, by the law of the place where it is made, is the universal language of the authorities upon the subject: *Smith v. Mead*, 8 Am. Dec. 183; *Greenwood v. Curtis*, 4 Id. 145; *Thompson v. Ketcham*, 5 Id. 332; *Smith v. Smith*, 3 Id. 410; *De Sobry v. DeLaistre*, Id. 535; *Warder v. Arell*, 1 Id. 488; *Touro v. Cassin*, 9 Id. 680; *Brackett v. Norton*, 10 Id. 179. This rule applied to members of an unincorporated company in an action in Louisiana, on a contract made by them in Mississippi: *Lynch v. Postlethwaite*, 12 Id. 495, and note.

CECIL v. PREUCH.

[4 MARTIN, N. S. 256.]

BAILEE FOR HIRE, DUTY OF.—A person who pastures cattle for hire must keep his ground properly inclosed.

APPEAL from the court of the first district. The opinion states the case.

Morse, for plaintiff.

Hoffmann, for defendant.

By Court, MARTIN, J. The defendant and appellant complains that the district judge erred in giving his charge to the

jury, and in refusing to charge them as the defendant requested, and that the jury and court erred in allowing interest from the judicial demand.

1. The defendant contended that the plaintiff having taken the defendant's cattle to pasture for hire, was bound to keep a sufficient fence to keep them in, and to pay for the lost ones, unless he proved that the loss occurred through force or accident; but the court told the jury that the defendant took on himself the risk of the fence that existed at the time he put his cattle to pasture, and the plaintiff was bound to keep it in the same condition, and no other; and unless the jury were satisfied the fence was not kept in the same condition, or negligence was proved, the plaintiff was not liable for the cattle lost, but was entitled to the hire. The judge stated in the bill of exceptions, it was proven the defendant was frequently in the field, and he, the judge, presumed the defendant must have seen the fence, and a witness deposed the fence was a good one.

2. The defendant required the court to charge the jury the plaintiff was bound to have the pasture ground kept by a guardian of equal skill and care as the one who had the care of the pasture when the defendant put in his cattle; and that if the jury thought a guardian less skillful or careful was put in place of the former, and any cattle escaped, unless a proper reason was shown, negligence of the plaintiff might be inferred. The judge refused to give the charge.

We think the court erred in charging the jury that the plaintiff was not bound to keep his fence in any better condition than it was when the defendant's cattle were put in, and the plaintiff ought to recover, unless the jury thought he did not keep his fence in the same condition.

A farmer who takes in cattle to pasture for hire must keep his ground under a good fence; and if it be not at the time he receives cattle, he ought immediately to repair it. Even though the owner of the cattle sees the fence is bad, the farmer is bound to put and keep it in good order, for the owner of the cattle has a right to expect this will be done, and needs not to make it a condition of the contract; for this condition is of the nature of the contract. We take no notice of the judge stating that he presumed the defendant saw the fence, and that a witness swore it was a good one. If anything was to be presumed, the presumption was the province of the jury; and the testimony of the witness might well influence the verdict of the jury, but could not aid the judge in framing his charge on an abstract question of law.

The charge required by the defendant was properly withheld. The plaintiff, if the second keeper of the ground was a proper one, complied with his contract, although the former might be a better one. This proposition is, in different words, the same as we have just now established; if the plaintiff was bound to have a good fence during the time he pastured the defendant's cattle, although he had an insufficient one when he received them, it suffices that he had a proper keeper during the time he pastured the cattle, although when they came he had one of superior skill and care, because such a one was neither of the essence nor of the nature of the contract.

As the verdict must be set aside, we inquire not whether interest was properly allowed.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, the verdict set aside, and the case remanded for a new trial, with directions to the judge not to charge the jury that the defendant took on himself the risk of the fence that existed when he brought his cattle, and the plaintiff was bound to keep it in the same and no other condition, and that unless the jury were satisfied the fence was not kept in the same condition, or negligence were proven the fence was not kept in like condition, the plaintiff was not liable for the cattle lost, and was entitled to the hire. It is further ordered that the plaintiff and appellee pay costs in this court.

THORN & Co. v. MORGAN ET AL.

[4 MARTIN, N. S. 292.]

INSOLVENT'S CONVEYANCE—CONFLICT OF LAWS.—A conveyance made by a citizen of Louisiana, who is insolvent, is void in that state although valid by the laws of New York where the same was executed.

APPEAL from the district court of the first district. The opinion states the case.

Morse, for the plaintiffs.

Ripley, and *Watts and Lobdell*, for the defendants.

By Court, **MATHEWS, J.** In this case the plaintiffs sue to recover a house and lot described in their petition as owners, under a title derived from John W. Oddie, an insolvent. The sheriff of the parish of Orleans, Clark, the syndic of the creditors of the insolvent, and Brand, the builder of the house, are made de-

fendants. The judgment of the court below is favorable to the claim of the plaintiffs, but subjects the property to the privilege of the builder. Both parties seem to be dissatisfied with the judgment below, and have appealed.

From the view which we have taken of the cause, it is unnecessary now to examine the claims or pretensions of any of the defendants, except that of Clark in his capacity of syndic, representing the mass of creditors of the insolvent. The act under which the plaintiffs claim title is attacked on the ground of legal fraud, as having been executed by the insolvent at a time when he was in failing circumstances. It was made in the state of New York, and however valid it may be under the laws of that state there are circumstances shown in the present case which subject it to the control of our state laws. The insolvent was a resident of New Orleans; went to New York, executed the title for the property in dispute in due form to the plaintiffs, and in one month afterwards attempted to avail himself of the benefit of the insolvent laws of that state; returned to New Orleans and made a *cessio bonorum* in pursuance of our laws in such cases provided. All these things were done in the course of six months. It was admitted by the counsel for the plaintiffs that a debtor could not legally and honestly go from this state into another and there dispose of his property to the prejudice of the mass of his creditors, under the sanction of foreign laws. Such an act is in *fraudem leges nostrum*, and ought not to be tolerated. Subjecting the decision of the present case entirely to the laws of the state of Louisiana, it offers little difficulty. We are clearly of opinion that the transfer was made by Oddie to the plaintiffs in *tiempo inhabil*, at a time when he was unable to pay all his debts, and when his property ought to have been considered a common pledge to all his creditors according to the rank and privilege of their claims. This case differs but little from the case of *Brown v. Kenner*, 3 Martin, 270, and the case of *Ritchie v. Sands*, 10 Id. 704. In the first, a mortgage given by a person who was in failing circumstances to a creditor, intended to favor him to the prejudice of the mass of the creditors, was declared null; in the other, a sale was set aside on account of having been made in fraud of creditors. The attempt made by Oddie to avail himself of the insolvent laws of New York, not more than one month after he had conveyed the property now in dispute to the plaintiffs, is such evidence of his inability to pay all his debts as to show clearly that he was insolvent at the time he

executed the deed of conveyance. Then all his property was a common pledge of his creditors, and no part of it could be legally transferred to any one of them to the prejudice of the rest. The deed is voidable according to the acts of 1818 and 1817, as it is by every principle of our laws relating to insolvency.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided, and reversed; and it is further ordered, adjudged and decreed, that sale of the property mentioned in the petition by John W. Oddie to the plaintiffs, be annulled and made void; and it is further ordered, adjudged and decreed, that the cause be remanded to the district court, with directions to cumulate the same with the proceedings in *concurso* of *John W. Oddie v. His Creditors*, reserving to the parties in the suit, other than the plaintiffs, the right to assert their claims on the property according to law. The plaintiffs paying costs in both courts.

That a transfer of property is invalid unless made in conformity with the laws of the state or nation in which such property is situate: See *Ramsay v. Stevenson*, 12 Am. Dec. 468, and note thereto.

BROWN AND SONS v. SAUL ET AL.

[4 MARTIN, N. S. 434.]

INTERVENTION—WHO MAY INTERVENE.—A person must have an interest that is direct and closely connected with the object in dispute, founded on some right, claim or lien, either conventional or legal, to be allowed to intervene.

CREDITOR MAY INTERVENE, WHEN.—A creditor whose claim has not been liquidated by a judgment has no right to intervene in an action between his debtor and a third person.

PLEADINGS.—Dilatory and declinatory pleas should be made at the proper time, or the same will be deemed waived; but a plea that shows a total want of legal right in a suitor may be objection to and advantage taken of the same at any stage of the proceedings.

APPEAL from the parish court of the parish and city of New Orleans. The opinion states the case.

Morse, for the plaintiffs.

Rawle, for the defendants.

Pierce and Livermore, for the intervening creditors.

By Court, MATHEWS, J. This suit was brought to recover from the defendant nine thousand dollars, money alleged to

have been lent him by the plaintiffs. In their petition they claim a privilege, as resulting from a pawn or pledge, of four hundred shares of bank stock in the bank of Orleans. Before judgment was rendered between the original parties to the action, the bank of Orleans and the bank of Louisiana each filed separate petitions of intervention and opposition to the privilege or preference claimed by the plaintiffs, as above stated, alleging the embarrassed state of affairs or insolvency of the defendant and imperfections in the act of pledge, as grounds of their opposition. They were permitted to intervene in the court below, and no objection seems to have been there made to their right of thus interfering with the interest and claims of the original parties. Judgment was finally rendered, supporting the opposition of the intervening parties, from which the plaintiffs appealed.

In the course of the argument before this court, it occurred to us that the banks, as individual creditors of the defendant, had no right thus to interfere with the administration of justice between him and other individual creditors who were pursuing their claims in the ordinary mode of legal procedure, as the plaintiffs had attempted in the present case. On further reflection and examination of the cause, we are fully convinced of the correctness of the opinion then suggested to the counsel. The soundness of this opinion is, however, denied by the advocates of the banks on two grounds, one of substance, the other rather of form. In support of the substantial and legal right of the present intervention, they refer the court to the articles 389 and 390 of the code of practice. The first of these articles does not in any manner support the pretensions of the parties intervening; for it contemplates an interest which such parties may have connected with that of one or other of the original parties to a suit, either plaintiff or defendant. In the case now under consideration, there is no union of interest in relation to the subject-matter in dispute, between the interpleaders and either of the original parties. They claim rights adverse to the pretensions of the plaintiffs, and not in union with any real interest of the defendant. The expressions of article 390 convey ideas on the subject of intervention, general and indefinite, and give that right in all cases where third persons have an interest in the success of either of the original parties. But the interest here intended, we are of opinion, must be direct and closely connected with the object in dispute, founded on some right, claim or lien, either conventional or

legal. It surely will not be contended, that under this law, in every case where a creditor sues his debtor, all separately, or any one of the other creditors of the same debtor, may intervene on a bare suggestion of insolvency. The interpretations, as above expressed, of these articles of the code of practice is in conformity with the principles established in the Louisiana code, particularly by article 1967.

Admitting the want of legal authority of individual creditors to intervene, for the purpose of invalidating contracts made by their debtors, unless the claims be liquidated by judgments, it is contended that this court can not notice any objection founded on such want of authority, because it was not made or pleaded in defense of the intervention in the present case, before trial in the parish court. It is perhaps a rule, almost without exception, that all objections to the personal capacity of a suitor to appear in justice, should be made in *limine litis*. All dilatory and declinatory pleas ought to precede the *contestatio litis*; and even peremptory exceptions should be regularly pleaded; but a total want of legal right in a suitor, in relation to the matters in litigation, ought to be taken into consideration and acted on by courts of justice, at any stage of a cause. They should not remain silent spectators of infringements of the true principles of laws, which they are appointed to administer.

Being of opinion that the intervening parties in the present case had no legal right thus to come in, it is ordered, adjudged and decreed, that the judgment of the parish court be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that judgment be entered against them as in a case of nonsuit, and that the cause be remanded to the court below, to be tried between the original parties, the interpleaders to pay all costs in both courts occasioned by their intervention.

INTERVENTION, ORIGIN AND NATURE OF.—The term intervention is said to be unknown to the common law and equity systems of jurisprudence, and, so far as it is employed in the United States, to have been borrowed from the civil law: *Hyman v. Cameron*, 46 Miss. 726. Various modes of practice in regard to the bringing in of additional parties to an action prevail in different states. Thus the court may, when a complete determination of the controversy can not be otherwise had, order additional parties to be brought in. So, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, may apply to the court to be made a party, and it may order him to be brought in by the proper amendment. A defendant may also in certain actions, on showing that a stranger to the action makes a demand for the same debt or

property for which the defendant is sued, obtain, after appropriate proceedings therefor, an order from the court substituting such stranger in the place of the defendant as a party to the action: Pomeroy on Remedies, sec. 412; Code of N. Y., sec. 122; Cal. C. P., sec. 386. Neither of these proceedings corresponds to the intervention of the civil law, nor to that of the code of Louisiana, or of the other states which have been modeled after it. In all these proceedings a stranger to the action is made a party defendant; in the first and third he is brought in without any action on his part, and usually against his will; in the second he is permitted to be made a party upon his own application; in the first and second, and perhaps in the third, the complaint must be amended so as to formally name him as a party defendant. An intervenor is not technically either a plaintiff or a defendant. He appears in his own application; and, in truth, he can not be compelled to appear as an intervenor: *Hazard v. Agricultural Bank*, 11 Rob. La. 326; *Le Blanc v. Dashiell*, 14 La. 274. He may assist either the plaintiff or defendant, or may take a position adverse to both. The pleadings of the original parties need not be amended on his account, though they may be required to answer such of his allegations as they desire to controvert. Intervention is often confounded with interpleader; but the two proceedings are entirely different. An interpleader is a proceeding by which a stranger to the action is, upon the application of the defendant, made to take the place of the latter as a party to the suit. An intervenor, on the other hand, is himself an applicant for permission to appear in a pending litigation, for the protection of his own interests; and, when permitted to appear, his attitude is as likely to correspond to that of the plaintiff as to that of the defendant.

INTERVENTION—STATUTORY PROVISIONS.—Probably the more accurate understanding of the law of intervention may be obtained by a perusal of the statutes upon that subject, than by any other means. Sections 389 to 393 of the Louisiana code of practice (edition of 1844), are as follows:

“Sec. 389. An intervention or interpleader is a demand by which a third person requires to be permitted to become a party in a suit between other persons; either by joining the plaintiff in claiming the same thing, or something connected with it, or by uniting with the defendant in resisting the claims of the plaintiff; or it may be lawful for him, where his interest requires it, to oppose both.

“Sec. 390. In order to be entitled to intervene, it is enough to have an interest in the success of either of the parties to the suit.

“Sec. 391. One may intervene either before or after issue has been joined in the cause, provided the intervention do not retard the principal suit; the person intervening must be always ready to plead or to exhibit his testimony; because he has always his remedy by a separate action to vindicate his rights.

“Sec. 392. The plaintiff in intervention must institute his demand before the court in which the principal action has been brought; being considered as plaintiff he must follow the jurisdiction of the defendant.

“Sec. 393. The intervention must be formed by a petition, addressed to the court before which the principal demand has been brought; it must set forth the grounds on which the cause is supported. This petition must be served on the party against which it is directed, in order that he may answer to the same in the delay given in ordinary suits.” The statutes of the state of Iowa on this subject may be found in sections 2683, 2684, 2685, of the revision of 1873, which are as follows:

“Sec. 2683. Any person who has an interest in the matter in litigation, in the success of either of the parties to the action or against both, may become

a party to an action between other persons either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the cause, and before the trial commences.

"Sec. 2684. The court shall determine upon the intervention at the same time that the action is decided, and the intervenor has no right to delay; and if the claim of the intervenor is not sustained he shall pay all costs of the intervention.

"Sec. 2685. The intervention shall be by petition which must set forth the facts on which the intervention rests, and all the pleadings therein shall be governed by the same principles and rules as obtain in other pleadings provided for in this chapter. But if such petition is filed during term the court shall direct the time in which an answer shall be filed thereto."

Section 387 of the code of civil procedure of California, declares that, "Any person may, before the trial, intervene in an action or proceeding who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court, and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint." The statutes of Colorado, Nevada and of Washington Territory upon this subject are in substantial conformity with the foregoing section of the code of civil procedure of California. We have been unable to discover any statute of Texas defining intervention or designating the circumstances in which it may be permitted. The courts of that state, however, at a very early day, determined that intervention must necessarily be a part of a system of jurisprudence in which common law and equity were administered by the same tribunals, and they therefore recognized and applied the rules of the Louisiana code of practice upon this subject: *Legg v. McNeil*, 2 Tex. 430. The courts of these two states have ever since administered the law of intervention in substantial harmony with each other,.

INTERVENOR MUST NOT DELAY THE SUIT.—The general principle may be deduced from all the decisions and statutes, that an intervenor is permitted to intrude into the suit as a matter of favor towards him, and that, while his admission, if he proceed with due diligence, is a matter of right and not of discretion, yet that he must not be permitted to delay the determination of the controversy between the original litigants. He must be at all times ready to exhibit his evidence and to proceed with the trial of the issues which he has obtruded into the action or proceeding: *Gaines v. Page*, 15 La. Ann. 108; *Walker v. Dunbar*, 7 Mart. 586; *Taylor v. Boedecker*, 22 La. Ann. 79; *Eccles v. Hill*, 13 Tex. 67.

THE APPLICATION TO INTERVENE MUST BE MADE BEFORE the trial of the cause. It has been refused on account of unjustifiable delay in presenting the petition therefor: *Van Buren v. Geer*, 12 Tex. 15; *Wright v. Neathery*, 14 Id. 211. It ought always to be denied if made after the trial has been commenced: *Fearing v. Ball*, 6 La. 685; *Lincoln v. Ball*, Id 698; or after the cause has been called for trial, and when the plaintiff is about to take

judgment and the permitting of the intervention must necessitate a continuance for the term: *Hocker v. Kelley*, 14 Cal. 165. An intervention may be allowed after the appointment of a receiver to take charge of the funds in controversy: *Graves v. Hall*, 28 Tex. 254; but not after an interlocutory decree in partition designating the respective interests of the parties: *Woolfolk v. Woolfolk*, 30 La. Ann. 139.

INTERVENOR MUST ACCEPT THE SUIT AS HE FINDS IT.—An intervention is permitted only for the purpose of permitting the applicant to protect his substantial rights in that action. If he does not like the form of the action or the place where it is pending, he ought not to seek to become a party to it. If the court has jurisdiction of the action as between the original parties, the intervenor can not contest the jurisdiction: *Kenner's Syndics v. Holliday*, 19 La. 154. "The intervenor cannot change the action. The ground on which a third party is permitted to come between the plaintiffs and defendants is, that the action between them may be injurious to him. His right is, therefore, limited to the suit pending; to see that it is correctly and legally decided:" *Carraby v. Morgan*, 5 Mart. N. S. 501. He can not object to the plaintiff's capacity to sue: *Cordill v. McCullough*, 20 La. Ann. 174. Neither will he be permitted to avail himself of those irregularities in the action, or in proceedings by attachment which might be urged by the defendant, nor can he ordinarily make those defenses which are personal to the defendant, and which the latter neglects to interpose or prefers to waive: *Fleming v. Baldwin*, 21 La. Ann. 118; *Bedell's Heirs v. Hayes*, Id. 643; *Emerson v. Fox*, 3 La. 178; *Carroll v. Bredewell*, 27 La. Ann. 239; *Hanchett v. Gray*, 7 Tex. 549; *Clamegeran v. Bucks*, 4 Mart. N. S. 487, *post*. Thus where an intervenor interposed for the purpose of claiming that certain attached property belonged to him, and then attempted to urge certain irregularities in the proceedings, the supreme court of Louisiana said:

"The plaintiffs, citizens of Boston, have attached property here, which they say belongs to the defendant, their debtor, also a resident of that place; the defendant pleaded the general issue, and the debt was proved; so that between plaintiff and defendant it only remained for the court to pronounce judgment accordingly. But a third person has stepped in averring the goods attached to be his property, and demanding restoration of them. The claimant has not only attempted to prove the property to be his, but he has been acting the part of the defendant, by undertaking to show that the attachment ought not to have issued, and that after it had issued it was imperfectly executed. The only thing which we conceive a claimant may be permitted to do is to show that the property attached is verily his. As soon as he succeeds in that his part is at an end. But a claimant has surely no right to show any irregularity in the suit in which he intervenes, for the sole purpose of rescuing the property. Whether the plaintiff, the court, and the sheriff have been acting legally or not is none of his business; for whether the proceedings are regular or not, the property must be shown to be his before it can be returned to him; and whether they are regular or not, it shall not be returned unless he proves that it belongs to him:" *Lee et al. v. Bradlee*, 8 Mart. 55.

APPLICATION, SUFFICIENCY OF.—The application for intervention is usually made by petition or complaint. It need not be verified: *Smith v. Allen*, 28 Tex. 501; but it must be treated as a complaint, and must, therefore, show affirmatively such facts as are requisite to entitle the applicant to intervene in the action: *People v. Talmadge*, 6 Cal. 256; *Clapp v. Phelps*, 19 La. Ann. 461.

WHEN INTERVENOR IS TREATED AS A PLAINTIFF AND WHEN AS A DE-

DEFENDANT.—If the intervenor makes an affirmative demand, he must necessarily be treated as a plaintiff, and required to allege and prove all those facts which are essential to support his claim, and to entitle him to relief: *Clapp v. Phelps*, 19 La. Ann. 461. When, however, he simply takes issue with the plaintiff's complaint, by denying those allegations therein which are essential to the plaintiff's recovery, his position corresponds to that of a defendant, and he need make no proofs except to rebut those offered by the plaintiff: *Speyer v. Ihmels*, 21 Cal. 281.

OBJECTIONS TO AN INTERVENTION must be made at the proper time, or they are waived: *McKenty v. Gladwin*, 10 Cal. 227; *Smith v. Penny*, 44 Id. 161. If the petition or complaint is answered, or the trial had without objection, it is then too late to question the intervenor's right to participate in the action, and to obtain the relief to which the proofs and admission show him entitled: *Herman v. Pfister*, 2 La. 456; *Donner v. Palmer*, 51 Cal. 629.

WHO MAY INTERVENE.—The great question constantly arising under the law of intervention is, who is entitled to intervene? This question has not yet been so answered as to permit the framing of any general rules sufficiently distinct to be of much practical utility; nor are the various answers, hitherto made, altogether reconcilable with one another. The language of some of the statutes is very broad. Thus, by section 390 of the code of practice of Louisiana: "In order to be entitled to intervene, it is enough to have an interest in the success of either of the parties to the suit." Equally comprehensive are the declarations of the codes of Iowa and California. But, surely, there must be many persons who have interests in the success of one or more of the parties to a suit who are, nevertheless, not entitled to intervene therein. The creditors and heirs of the plaintiff, usually, have an interest in his success, for thereby his estate may be enlarged; the heirs and creditors of the defendant have an interest in his success, for thereby his estate may remain unimpaired. But a mere creditor of one of the parties is not, on that account, entitled to intervene: *Pierre v. Masse*, 7 Mart. N. S. 196; *Horn v. Volcano Water Co.*, 13 Cal. 62. Creditors have no right to intervene in proceedings by heirs against an administrator to compel him to account: *Thomas' Succession*, 12 Rob. La. 215. But in some proceedings, creditors are entitled to interpose; but, so far as we are aware, these extend to those cases only in which the intervening creditors have acquired some lien upon the property of one of the litigants, and this lien is in danger of being impaired or destroyed by the operation of the pending suit.

Thus in *Davis v. Eppinger*, 18 Cal. 378, an action was instituted on a note before it became due, and an attachment issued, and was levied on the property of the defendant on July 6, 1860. Klopenstine & Co. were creditors of the defendant by a judgment entered in February of the same year. Execution on this judgment was levied on the attached property July 7, 1860. Klopenstine & Co. then "filed their bill of intervention, setting out the facts before stated, and in addition thereto charging that Davis, at the time of the institution of his suit had no cause of action against Eppinger; that Eppinger was insolvent; that the property levied upon was not sufficient to satisfy these judgments; that the suing out and levy of this attachment was a fraud upon their rights, and hindered, delayed, and defrauded them in the collection of their debt; that Davis and Eppinger had combined to hinder, delay and defraud the creditors of Eppinger; and praying that the attachment of Davis be postponed to their execution." The bill was held to show a sufficient case for intervention. A very similar state of facts was shown in a subsequent case in the same state, in disposing of which the court said:

"Although the intervenors have not a claim to or lien upon any property which is the direct subject of litigation in this action, they have a lien upon property which is held subject to the results of the litigation, and which would be lost to the intervenors if the original action should proceed to judgment and execution. If the case does not fall within the precise definition of the cases in which intervention takes place, as given in section six hundred and fifty-nine, and as explained in *Horn v. Volcano Water Co.* 13 Cal. 62, it is substantially within the object provided for by that section; and as that is a law only regulating modes of procedure and not rights of property, we think the interpretation given to it in the case of *Davis v. Eppinger* should not be changed." *Speyer v. Ihmels*, 21 Cal. 287; *Coghill v. Marks*, 29 Id. 673. In some of the states a claimant of property attached may intervene for the purpose of showing that it belonged to him and not to the defendant: *Field v. Harrison*, 20 La. Ann. 411. The following applicants were held entitled to intervene; the equitable owner of a promissory note on which suit had been brought: *Taylor v. Adair*, 22 Iowa, 279; one who had assigned to plaintiff the note in controversy, but retained an interest in its proceeds: *Gradwohl v. Harris*, 29 Cal. 150; one who claimed adversely to both parties, the note sued upon: *Stich v. Dickinson*, 38 Id. 608; a county to recover a tax levied upon money in litigation: *Yuba County v. Adams*, 7 Id. 37; a state, in an action against one of its officers to compel him to issue a warrant for the payment of money out of the public funds: *State v. Graham*, 23 La. Ann. 402; *State v. Dubucet*, 22 Id. 365; a citizen in an action by a city to prevent the erection of houses in a public place: *Mayor v. Gravier*, 11 Mart. 620; a purchaser *pendente lite* of a pending suit: *Baum's Succession*, 11 Rob. La. 314; or of the property in controversy: *Brooks v. Hager*, 5 Cal. 281; *Marigny v. Nivet*, 23 La. 498; a partner in a suit in which his copartners were plaintiffs: *Norris v. Ogden*, 11 Mart. 455; a mortgagee in a suit to set aside a sale upon which the mortgagor's title was based: *Webb v. Keller*, 26 La. Ann. 596; a wife in a suit to foreclose a mortgage upon the homestead: *Sargent v. Wilson*, 5 Cal. 504; *Moss v. Warner*, 10 Id. 296; *Dillon v. Byrne*, 5 Id. 456; the claimant of a debt which had been garnisheed: *Daniels v. Clark*, 38 Iowa, 556; the sureties of the defendant in an action of replevin, who had given a bond to procure the return to him of the personalty in controversy; *Coburn v. Smart*, 3 Pac. L. J. 133; a claimant of money collected by a sheriff upon execution: *Cobb v. Depuc*, 22 La. Ann. 244; a consignor claiming a right of stoppage *in transitu*, in an action by the assignee of a bill of lading to recover goods of a forwarding merchant: *Chandler v. Fulton*, 10 Tex. 11.

The following have been denied the right to intervene: one who claimed adversely to both plaintiff and defendant in an action of forcible entry and unlawful detainer: *Warren v. Kelly*, 17 Tex. 549; an attorney who claimed the right to recover his fee in the case of the defendant on the ground that the latter had settled with plaintiff: *Whittaker v. Clarke*, 33 Id. 649; a person who sought to join with the plaintiff on the ground that he was to have a part interest in the proceeds of the contract on which the action was brought: *O'Brien v. Police Jury*, 2 La. Ann. 355; a taxpayer in an application by mandamus to compel an officer to do certain acts requisite to the levying of a tax: *Harwood v. Quinby*, 44 Iowa, 385; a person in possession of real estate for which an action of ejectment had been brought, and who claimed adversely to both parties. The following is the opinion of the court in the last case, denying the right to intervene: "The 'matter in litigation' was, at the time of the intervention, the alleged right to the possession on the part of the plaintiff, and the ouster of plaintiff by the defendant. The intervention contains no averment that the intervenor is in any way connected

with the right to the possession asserted either by plaintiff or defendant, but on the contrary alleges that he has title paramount to both, and that he has been in the actual possession for more than five years. The intervenor, therefore, had no interest in the matter in litigation. If the intervenor is the owner and in possession of a portion of the premises sued for, he cannot be disturbed in his possession under any process which may be issued on a judgment in favor of plaintiff against the defendant. If he has no connection with the defendant, it is plain that a judgment against defendant can not be resorted to to remove him. If defendant held for him, his proper course would have been to apply for leave to defend in the name of defendant. Nor can plaintiff claim that the intervenor shall be bound by a judgment which may have been taken against the defendant, on the ground that he actually appeared and assisted to defend on behalf of defendant, since the pleading on which he alone has claimed his right to appear has been set aside and disregarded by this court on the application of plaintiff himself:" *Porter v. Garrissino*, 51 Cal. 560, 561. The case of *Horn v. Volcano Water Co.*, 13 Id. 62, is a leading one on the subject of intervention. The plaintiff brought against the defendant an action to foreclose a mortgage, in which action certain creditors of the defendant intervened, alleging fraud in the execution of the note and mortgage, and that they were therefore void as against the defendant and its creditors. Of these creditors, Rawle was a simple contract creditor without any lien whatsoever. The others were judgment-creditors of the defendant, having, as such, liens upon its property. The court thus considered the merits of the interventions:

"The petition of the creditor, Rawle, does not disclose any right on his part to intervene; it shows that he was a simple contract-creditor, holding obligations against the company, but it does not show that any portion of them was secured by any lien upon the mortgaged premises. His intervention is only an attempt of one creditor to prevent another creditor obtaining judgment against the common debtor, a proceeding which can find no support either in principle or authority. The interest mentioned in the statute which entitles a person to intervene in a suit between other parties must be in the matter in litigation and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. The provisions of our statute are taken substantially from the code of procedure of Louisiana, which declares that, 'in order to be entitled to intervene it is enough to have an interest in the success of either of the parties to the suit;' and the supreme court of that state, in passing on the term, interest, thus used, held this language: 'This, we suppose, must be a direct interest by which the intervening party is to obtain immediate gain or suffer loss by the judgment which may be rendered between the original parties; otherwise the strange anomaly would be introduced into our jurisprudence of suffering an accumulation of suits in all instances where doubts might be entertained or enter into the imagination of subsequent plaintiffs, that a defendant, against whom a previous action was under prosecution, might not have property sufficient to discharge all his debts. For as the first judgment obtained might give a preference to the person who should obtain it, all subsequent suitors, down to the last, would have an indirect interest in defeating the action of the first:' *Gasquet et al. v. Johnson et al.*, 1 La. 431. To authorize an intervention, therefore, the interest must be that created by a claim to the demand, or some part thereof, in suit, or a claim to, or lien upon, the property, or some part thereof, which is the subject of litigation. No such claim or lien is asserted in the petition of Rawle; and his right to

intervene must in consequence fail: *Brown & Sons v. Saul et al.*, 4 Mart. N. S. 434.

"The petition of Schaffer and others stands upon a different footing. It shows that they were judgment-creditors, having liens by their several judgments upon the mortgaged premises at the time of the institution of the present suit. As such they were subsequent incumbrancers and necessary parties to a complete adjustment of all interests in the mortgaged premises, though not indispensable parties to a decree determining the rights of the other parties as between themselves. For such adjustment the court would have been justified in ordering them to be brought in either upon their own petition, as in the present case, or by an amendment to the complaint: *Sargent v. Wilson*, 5 Cal. 504; *Moss v. Werner*, 10 Id. 296; *Montgomery v. Tutt*, 11 Id. 307." *Horn v. Volcano Water Co.*, 13 Id. 69, 70. See, to the same effect: *Harlan v. Eureka M. Co.*, 10 Nev. 94; *State v. Wright*, 10 Id. 167.

THE RIGHTS OF THE INTERVENOR AFTER HE HAS BEEN PERMITTED to become a party to the action are as comprehensive as those of the original parties, except that he will probably not be permitted to delay the trial in order to obtain his evidence, nor to raise objections to irregularities in the prior proceedings, nor to urge defenses which are personal to the original parties. He is entitled to trial by jury: *Lacroix v. Menard*, 3 Mart. N. S. 339 [15 Am. Dec. 161]. His right to proceed with the litigation and determination of his rights can not be affected by the granting of a nonsuit against the plaintiff, nor by the plaintiff's dismissal of the action: *Elliott v. Ivers*, 6 Nev. 287; *Field v. Gantier*, 8 Tex. 74; *Poehlman v. Kennedy*, 48 Cal. 201. He may claim the benefit of the original suit for the purpose of protecting himself and his claim from the operation of the statute of limitations: *Field v. Gantier*, 8 Tex. 74.

THE LIABILITIES OF INTERVENORS have, we believe, never been determined or considered in any of the reported cases. Some of the statutes speak of the intervenor's becoming a party to the action. To what extent, then, does intervention make one a party? Does he come in for better or for worse? Can he acquire benefits without assuming burdens? Is he to strike whomsoever he pleases, without being subjected to any blows in return? To these questions we can respond only by giving our own opinion, unsustained by authority. It occurs to us that an intervenor, once admitted as a party to the action, must remain such to the end of the litigation; that he can not withdraw from the suit; and that there can be obtained against him the same relief as if he had been made a party defendant at the institution of the action.

CORRECTORY REMEDIES.—In *Wenborn v. Boston*, 23 Cal. 321, an order denying a motion for leave to intervene, was held not to be appealable, because it was not a final judgment. Subsequent decisions in the same state seem to establish a different rule, and to give an immediate right of appeal to one whose application for leave to intervene is denied: *Stich v. Dickinson*, 38 Cal. 608; *Coburn v. Smart*, 3 Pac. L. J. 133; *State v. Parish Judge of St. Mary*, 27 La. Ann. 184. Mandamus is not the proper remedy when an application for intervention is erroneously denied: *People v. Sexton*, 37 Cal. 532. If an intervenor is dissatisfied with the final judgment in the action he can not avail himself of the appellate proceedings of the other parties to the action; but must prosecute a separate appeal, giving a notice and undertaking on his own behalf: *State v. New Orleans*, 27 La. Ann. 469; *Beckwith v. Peirci*, 22 Id. 67.

CLAMAGERAN v. BUCKS AND HEDRICK ET AL.

[4 MARTIN, N. S. 487.]

WHEN INTERVENOR HAS NO RIGHT TO URGE IRREGULARITIES.—A person has no right to intervene in an action for the purpose of having the cause dismissed for irregularities in the proceedings.

APPEAL from the parish court of the parish and city of New Orleans. The opinion states the case.

Cuvillier, for plaintiff.

Watts and Lobdell, for the intervening creditors.

By Court, PORTER, J. This action was commenced by attachment. An attorney was appointed for the absent debtor, an answer was filed by him, and the cause put at issue.

At this stage of the proceedings Mellon intervened. In his petition he states that the defendants in this suit were indebted to him, and that he had attached the same property which was levied on in this case. That by reason of these premises he had a right to intervene, and show that the affidavit on which the attachment had issued was not made according to law; that, consequently, all the proceedings were null and void.

The court below refused to set aside the attachment, and gave judgment for the plaintiff. The intervening party appealed.

We are of opinion the court below did not err. The affidavit contains every substantial averment which the act of the legislature requires, and it is sufficiently positive, for perjury could be assigned on it, if the affiant swore falsely. We are also of opinion, that an intervening creditor can not plead peremptory exceptions, the only object of which is to have the cause dismissed for irregularities in the proceedings. These were matters for the consideration of the defendants, or those who represented them, and if they thought fit to waive a defense which should not be used in a just action, no other party can. It is exercising rights which do not belong to him, and which no law that we are acquainted with confers.

It is, therefore, ordered, adjudged and decreed that the judgment of the parish court be affirmed, with costs.

ROUQUIER'S HEIRS v. ROUQUIER'S EXECUTORS.

[5 MARTIN, N. S. 93.]

LANDS GIVEN BY THE GOVERNMENT TO A HUSBAND or wife during coverture are the separate estate of the spouse to whom they are so given.

APPEAL from the court of the sixth district. The opinion states the case.

Deblieux, for the plaintiffs.

Rost, contra.

By COURT. The heirs of the wife claim a tract of land in possession of the executors of the husband, on the ground that it made a part of the community of acquests and gains, and that the husband, in his life-time, sold to them all the property which he had held in community with his wife.

The only question in the case is, whether the tract of land sued for made a part of the community of acquests and gains. It appears to us it did not. The title from the Spanish government was, it is true, obtained during coverture, but the concession was in the name of the husband alone, and it has been already decided in the case of *Gayoso v. Garcia*, 1 Mart. N. S. 324, that lands granted by the king to one of the married parties did not enter into the community. This opinion has been lately reviewed and confirmed in the case of *Frique v. Hopkins*, 4 Mart. N. S. 212, where the subject has been gone into at length.

The plaintiffs have endeavored to distinguish the rights of the parties before us from those already decided, on the ground that the motive for asking for the land from the government was that it might benefit the community property. The weight to which this argument is entitled has been considered in the last case cited, and our opinion fully expressed on it. We are satisfied that it can not have the influence which the plaintiffs attached to it; and even if it did, the facts of the case do not bring them within the exception contended for; for the grantee asks for the land, not for the use of the property of the community, but for his own, *ses propres animaux*.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

LANDS GIVEN BY THE SOVEREIGN TO EITHER OF THE SPOUSES, during coverture, formed, according to the laws of Spain, the separate property of the one in whose name the gift was made, except when the gift was in consideration of military services rendered by the husband, without pay, and while he was supported out of the community assets: *Wilkinson v. Am. Iron Mountain*

Co., 20 Mo. 128; *Frique v. Hopkins*, 4 Mart. N. S. 212; *Rouquier v. Rouquier*, 5 Id. 98; *Gayoso v. Garcia*, 1 Id. 334. This law has been held to be applicable to a donation made by the United States government to a citizen of Louisiana, while the laws of Spain were still in force in that state: *Hughey v. Barrow*, 4 La. Ann. 250. The chief test for determining whether property acquired by either husband or wife during the marriage was community assets, under the laws of Spain, was to ascertain whether it was acquired by onerous title. If so acquired, it belonged to the community. An onerous title is defined to be that by which we acquire anything, paying its value in money, or in any other thing, or in services, or by means of certain charges and conditions to which we are subjected: *Yates v. Houston*, 3 Tex. 453; *Noe v. Card*, 14 Cal. 596. The grants of land made to married men in Texas, under the colonization law of 1823, and also lands acquired by husbands, as heads of families, under the act of January 4, 1839, have been treated in that state as acquisitions by onerous title, and as being, on that account, exempt from the general rule that grants from the sovereign are the separate estate of the grantee: *Wilkinson v. Wilkinson*, 20 Tex. 242; *Yates v. Houston*, 3 Id. 453. The decisions in Texas are based upon the theory, that as the gift from the government was made upon certain conditions with which compliance was necessary, and as certain fees were required to be paid to certain officers of the government, the acquisitions were by onerous and not by lucrative title. The judicial tribunals of California dissent from those of Texas upon this subject. A justice of the peace, under the Mexican government, granted a lot in the present city of San Francisco to one Noe, subject to the conditions that, within one year, the lot should be fenced and have a house built thereon, and certain municipal fees established by law paid. In regard to these conditions, the court, by Chief Justice Field, said: "At the civil law, as at the common law, donations may be accompanied with conditions, the performance of which may be required for the possession or enjoyment of the property donated. When the donation is solicited for specific purposes it may be accompanied with conditions limiting the property to such purposes without changing the character of the act, even when the conditions impose the discharge of expensive and burdensome duties. Thus, if one should solicit a gift of land in order that he might construct a church or college thereon, and the land should be granted on condition that such church or college should be erected, the gift would be none the less a donation for the presence of the condition. The premises were not, therefore, the less gratuitously given or the less valuable to him, because granted subject to the condition of their appropriation to that end. The house and fence were to be built for the benefit of the donee, and not for the government. There was, therefore, no consideration in the performance of these acts, moving to the government, which may be regarded in the nature of a price, which is essential to all contracts of sale.

"The condition requiring the construction of a house within a year was very generally annexed to grants made under the Mexican government in California, whether the grant embraced a city lot or leagues of land. The performance of the condition was exacted in furtherance of the general policy of the republic to induce settlements, and not as a price to the government upon any notions of sale." The court were also of the opinion that the fees required to be paid "were altogether incidental to the grant, and formed no part of its consideration," and that the title to the lot vested in Noe, as his separate estate: *Noe v. Card*, 14 Cal. 595; see, also, *Wilson v. Castro*, 31 Id. 420; *Scott v. Ward*, 13 Id. 468; *Fuller v. Ferguson*, 26 Id. 546; *Freeman on Co-tenancy and Partition*, sec. 133.

PARKINS v. CAMPBELL.

[5 MARTIN, N. S. 149.]

SALE ON A SECOND INSTALLMENT due on a mortgage transfers title free of the lien of a prior installment on the same mortgage.

APPEAL from the court of the sixth district. The opinion states the case.

Baldwin, for the plaintiffs.

Scott, *contra*.

By Court, **MATHEWS, J.** In this case the plaintiffs obtained an injunction, by which proceedings an order of seizure were delayed, wherein the defendants were about to cause to be sold a tract of land claimed by said plaintiffs.

On hearing the cause the injunction was made perpetual from which the defendants appealed. The facts of the case show, that the appellants being indebted to the appellees, transferred to the former a debt, which the latter held on a third person, secured by mortgage, on the land which they attempted to seize and sell as above stated. The claim transferred was a second installment of the debt thus secured by mortgage, on which the mortgaged property was regularly seized and sold for the benefit of the transferees, was purchased by their agent and the title transferred to them, or one of them. Since this sale the order of seizure, or execution complained of in the petition for an injunction, issued in favor of the appellants on a previous installment, which was secured by the same act of mortgage, and which is perpetually enjoined by the judgment of the district court. We are of opinion that the judgment thus rendered is correct.

The persons in whom the right to the first installment remained, having taken no steps to enforce their claim, until after the second became due, and the mortgaged property was seized and sold under it, have lost their lien on said property, in the hands of third possessors. The sale under the mortgage destroyed entirely its force, and gave a complete title to the purchaser. How the proceeds arising from such sale should be divided, or whether they be subject to divisions and partition between the owners of the different installments secured by the hypothecation, are questions which do not occur in the present suit.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

MILNE v. DAVIDSON.

[5 MARTIN, N. S. 409.]

THE ORDINANCES OF A MUNICIPAL CORPORATION have, when valid, as binding an effect on the members thereof as if they were statutes enacted by the state legislature.

A CONTRACT TO RENT A HOUSE FOR A PURPOSE FORBIDDEN by a valid city ordinance is illegal and can not be enforced.

THE ERECTION OF A PRIVATE HOSPITAL within the limits of a city may be forbidden by ordinance and thereby made unlawful.

APPEAL from the court of the first district. The opinion states the case.

Preston, for the plaintiff.

Smith, *contra*.

By Court, PORTER, J. The parties to this suit, on the thirteenth of July, 1824, entered into the following agreement: "Alexander Milne agrees to let to Doctor Richard Davidson the premises the said Davidson now occupies, as a hospital, at the corner of Levee street and Marigny's canal, for the term of twelve months, commencing on the fifteenth of July, 1824, and ending on the fifteenth of July, 1825, for the sum of one thousand dollars, payable quarterly."

There existed at the time of this agreement, an ordinance of the city of New Orleans, which prohibited the erection of a private hospital within its incorporated limits, and, in consequence thereof, the defendant was expelled by the municipal authorities from the premises.

The court below was of opinion, that as the agreement was made in opposition to, and in violation of, a positive law, the plaintiff could not recover. From the judgment rendered in conformity therewith he has appealed.

The case has been heard in this court, *ex parte*, the counsel for the appellee not appearing. The one hundred and fifty-seventh article of our code declares, "that all things that are not forbidden by law, may legally become the subject of, or the motive for, contracts:" Civ. Code, 1757. It follows, therefore, that those things which are forbidden by law can not become the subject of, or the motive for, contracts. The appellant contends, in the first place, that these expressions in our code refer to contracts passed in violation of the general law of the land, not to those which are made in opposition to the rules and regulations of particular corporations.

The force of this distinction is not perceived by the court. The ordinances of corporations, while acting within the powers conferred on them by the legislature, have as binding an effect on the particular members of that corporation as the acts of the general assembly have on the citizens throughout the state; and it is as much a breach of duty to evade or violate the one as it would be to evade or violate the other. The moral and legal obligation to obey them is the same, and the consequences of non-obedience ought to be the same.

But the defendant has more seriously urged, in the second place, that this ordinance is one which the city council had no authority to enact; and that, consequently, it was not illegal for the parties to violate it. An act of the legislature, passed the fourteenth of March, 1826, gives to the mayor and city council full power and authority to make and pass such by-laws as they shall deem necessary to maintain the cleanliness and salubrity of the city: 3 Mart. Dig. 224, 226.

In opposition to the strong support which the case of the appellee derives from the extensive power conferred on the municipal authority by this legislation, the defendant has contended that the ordinance violates natural right; and he has sustained the general reasoning which he offered to the court by cases determined in New York and England, where it was held that the fears of mankind, although well founded, did not justify a court of justice in ordering the object which excited their apprehension to be abated as a nuisance.

The natural right to the enjoyment of property, in opposition to the positive regulations of society, is a subject of little utility in a court of justice. It is true that the right to acquire property may be regarded as one of those which is inherent in man; but this right, which took its rise in the law of nature, has received its perfection, and had a permanency given to it by municipal or civil law; and it is in relation to this law that the right of individuals to the possession and enjoyment of things must be examined. The modifications which legislative power may make in the possession, use, and distribution of property are infinite; and nearly every contest which arises in courts of justice proceeds from the real or imputed violation of some one of those modifications; any one of which might be urged to be a violation of natural law, with as much reason as that of which the appellant now complains. Our code defines absolute ownership to be that which gives the right to enjoy and to dispose of one's property in the most unlimited manner; provided it is not

used in a way prohibited by laws or ordinances: Civ. Code, 483.

The cases read by the appellant's counsel from the common law books certainly go to show that an establishment, such as that contemplated by the parties to this action, at the time the lease was made, would not be illegal in countries governed by that jurisprudence. But the authority of the city council to make the regulations complained of can not be tested by the principles of the common law in relation to nuisances. No such guide is given to them by the charter. No such limit can be inferred from the motives which we must suppose induced such a grant of power: nor from the language by which it is conferred. The police of cities require many regulations, which grow out of their situation, their climates and their population; and many things which would not amount to a nuisance at common law, might be hurtful here. An illustration of this may be found in the general recourse to quarantine regulations in warm climates, and the rare resort to them in cold ones. In a city like ours, where a dreadful epidemic, frequently returning, checks its growth, and occasions a great mortality among the citizens, too much care can not be taken to remove the causes which give rise to it. We have no doubt that the spirit and intention of the act of the legislature was, as its language indicates, that an extensive discretion should be vested in the city council. A much stronger case than that now before us must be presented to induce this court to interfere, and say that regulations, having for their object public health, were beyond their power, because they are contrary to our ideas of expediency.

Being, therefore, of opinion that the city council possessed the authority to prohibit the erection of private hospitals, it follows that an agreement made in direct violation of it can not be enforced in a court of justice.

It is, therefore, ordered, adjudged, and decreed that the judgment of the district court be affirmed, with costs.

ILLEGAL CONTRACTS.—That no action will lie upon a contract originating in a transaction forbidden by statute is now well settled, and the authorities establishing that to be the rule are cited at length in the note to *Seidenbender v. Charles*, 8 Am. Dec. 691; see *Mitchell v. Smith*, 2 Id. 417; *Hibernia T. Corp. v. Henderson*, 11 Id. 593. As to what contracts are void, as being in *fraudem legis*, see *Rogers v. Waller*, 9 Id. 758. Money paid on an illegal contract recoverable: *Gray v. Roberts*, 12 Id. 383, note 385.

THE EFFECT OF ORDINANCES OF MUNICIPAL CORPORATIONS is correctly stated in the principal case. "Although the proposition that the legislature

of a state is alone competent to make laws is true, yet it is also settled that it is competent for the legislature to delegate to municipal corporations the power to make by-laws and ordinances which, when authorized, have the force, as to the persons bound thereby, of laws passed by the legislature of the state:" Dillon's Mun. Corp., sec. 245, citing *Heland v. Lowell*, 3 Allen, 407; *Church v. City etc.*, 5 Cow. 538; *St. Louis v. Boffinger*, 19 Mo. 13; *St. Louis v. Bank*, 49 Id. 574; *Jones v. Ins. Co.*, 2 Daly, 307; *McDermott v. Board of Police*, 5 Abb. Pr. 422; *Taylor v. Carondelet*, 22 Mo. 105; *Hopkins v. Mayor of Swansea*, 4 M. & W. 621. But the power of the municipality must be founded upon some grant from the legislature. The law upon this subject is thus stated by Mr. Wood in sections 738 and 739 of his work upon the Law of Nuisances: "A municipal corporation derives all its powers from the legislature. It may do any act which it is authorized to do by that body within the constitutional exercise of its powers, and all acts that are fairly and legitimately incident to the powers granted; but it can not lawfully go beyond that point. It takes nothing by implication except such powers as are fairly and legitimately within the letter and spirit of the grant. The fact that the public good, or the welfare of the corporation, requires that certain acts should be done does not warrant their being done, unless they come within the scope of the powers delegated. The charter and special acts in addition thereto, if there be any, are the measure of its power, and when it exceeds those powers its acts are unlawful, unwarranted and afford no protection whatever to those acting under them. Therefore, a municipal corporation has no control over nuisances existing within its corporate limits except such as is conferred upon it by its charter or by general law. There can be no question, however, but that where a nuisance exists within its corporate limits that is clearly a nuisance at common law or by statute, that is detrimental to the health of the inhabitants, it may be abated by the authorities; but it must be a nuisance at common law and one which any person injured thereby might lawfully abate of his own motion, or, in the absence of express or implied authority given, the removal or abatement of the nuisance would be unlawful. Where the thing abated is clearly a nuisance, and one which affects the health of the city, the abatement may be made by the authorities, or by any person injured thereby. The common law, in such a case, comes in aid of the authorities, and they are justified in the act, not because they are officials of the city, but because they are citizens injured by the thing abated." The instances in which a city may protect its inhabitants from a nuisance are very numerous; and the powers of the state legislature, whether acting through general laws, or operating through the authority delegated by it to the common council, boards of trustees, or other municipal boards or authorities, are very comprehensive, as will be seen by examining *North Western Fertilizing Co. v. Town of Hyde Park*, 7 Cent. L. J. 470; Wood on Nuisances, secs. 740, 741; Dillon's Mun. Corp., secs. 308-311; Cooley's Con. Lim. 595-596.

TERRITORY WHICH MAY BE AFFECTED BY AN ORDINANCE.—Generally, we conceive that the authority of a municipal corporation must be restricted to the protection and government of the persons and property within its territorial limits. But various contingencies may arise in which the authority of a city is practically inoperative, unless it extends beyond those limits. Thus the health of its inhabitants may be endangered by nuisances existing without as well as those existing within the corporate limits. Thus in a case recently determined by the supreme court of Illinois, it appeared that the city of Chicago had adopted an ordinance prohibiting any person or corpora-

tion from engaging in the business of slaughtering animals, or packing them for market, within the city or within one mile of the city limits. The defendant was engaged in carrying on a business prohibited by the ordinance, within the town of Lake, but also within one mile of the city. The defendant claimed that the authority of the city could not extend to the inhibition or control of a business situated in an adjoining town. In disposing of this question, the court said:

“But it is urged that the establishment of appellant is within the corporate limits of Lake, and it has a license from that municipality to pursue its business, and the city of Chicago is therefore powerless to assume control over the business of appellant, or the establishment in which it is done. There can be no doubt that the general assembly may, for police purposes, prescribe the limits of municipal bodies. It may enlarge or contract them at pleasure, and may define the limits within which their general powers may be exercised, and extend or limit the boundaries in which special powers may be performed. Under the general law the limits prescribed by special charters of cities and villages are recognized as still existing, and within which they may exercise their general powers; but in addition thereto this act has, for specified purposes, enlarged those boundaries one mile in every direction from the city or village limits proper, and the legislature has the power to increase those limits even though they may lap over territory in the limits of other municipalities. As to the possession of this power there is no question, otherwise it would not have legislative powers essential to government; nor is there any restriction upon the power. Having the power, did they exercise it by this enactment? We can see many weighty reasons for exercising it.

“The town of Lake, under its charter, is in its limits co-extensive with the congressional township. It is vested by its charter with powers usually confined to cities and villages. But did the general assembly intend that so extensive a municipality territorially, and not populated as a city, might, on its border adjoining the city of Chicago, license establishments not at all inconvenient or injurious to its less dense population, but intolerable nuisances to the dense population of the city? Did they intend that the city should be annoyed and injured in health and comfort by the exercise of the power of a corporation with a comparatively sparse population, and to submit to have imposed upon them such nuisances as the town of Lake might impose by licensing them? We can not suppose the general assembly so disregarding of the health and comfort of such great numbers of people; but on the contrary, we must suppose it was intended that the people of Chicago and other cities under like circumstances should have the means of protecting themselves against such intolerable wrongs as might thus be inflicted upon them. We must conclude that the general assembly, rather than subject our large cities to such hazards from smaller municipalities in their immediate vicinity, would have repealed the charters of the latter, or at least have curtailed their power. Whilst it is extremely difficult in large and crowded cities, with their various commercial, manufacturing and other pursuits, clashing each with the other, to so adjust the laws as to alike protect every right and interest, all must, to some extent, have his rights restricted for the benefit of all its people. What in an open and thinly settled country would be innoxious as a business would in the heart of a city be a terrible nuisance producing death, destroying property, and highly injurious to health and destructive to comfort. Persons then desiring to engage in particular avocations in or near to cities must submit to have their pursuits limited and controlled, at least so far as the preservation of health, and to a reasonable extent, the

comfort of the people may require; nor can the inhabitants of a city expect to be free from the tainted atmosphere produced by a thousand causes that do not exist in the country, or in places less densely populated. Whilst trade, manufactures, and commerce have large claims on the law for protection, theirs are not the only; nor are they the highest claims. The lives, the health and the comfort of the people are the highest, and demand the first and greatest protection. Yet in a great city like Chicago, which may no doubt justly claim to be the greatest cattle and hog market and the greatest meat packing mart in the world, the people can not expect to breathe the air as pure and invigorating as in the open country; but they do have the right to be protected against all kinds of business that endanger life and health, and from intolerable nuisances that destroy their comfort. To accomplish this purpose, the power was conferred upon cities and villages to regulate these establishments for the distance of one mile beyond their corporate limits, even if that should lap over and embrace a portion of territory included in the boundaries of another municipality. Each to that extent has the right to protect its inhabitants, and such establishments located in such territory are subject to the police power of both corporate bodies. This is within the letter, and we have no doubt, the spirit of the law. Nor does the fact, that appellant is liable to pay a fee to each municipality for the privilege of pursuing a vocation the general assembly regards of such a character as to require regulation and control militate against the grant or exercise of the power." *Chicago Packing etc. v. The City of Chicago*, 88 Ill. 226; 10 C. L. N. 337.

POWER TO DETERMINE WHAT IS A NUISANCE.—A very important question, and one upon which we are unable to reconcile the existing adjudications, is, can a municipal corporation, or any of its non-judicial boards or authorities, be vested with the power of determining that a particular thing or business is a nuisance; or, in other words, may a person who has engaged in the maintenance of something which has, by ordinance, been declared a nuisance, prove in his defense that the business interdicted was not of the character which it was thus declared to possess. In *Kennedy v. Board of Health*, 2 Pa. St. 366, it was shown that the board was charged by the statute with the duty of causing the removal of all offensive and putrid substances, and all nuisances which, in their opinion, had a tendency to endanger the health of the citizens, etc. They declared that a certain lot was a nuisance, because filled with stagnant water, and proceeded to remove the nuisance, by causing the lot to be filled in. The proprietor was then sued for the expense incurred by the filling. One of the errors assigned in the appellate court was, that the defendant was, in the trial court, denied the right to prove the cause of the nuisance. The court thus summarily disposed of this assignment: "It is not easy to perceive the relevancy of such evidence, unless it was intended to show by it, that there was no nuisance to be removed; but this latter could not be proved, for the act of assembly on the subject, as recited above, makes the order of the board conclusive, that the nuisance did exist, and expressly enacts that the fact of the nuisance shall not be inquired into. The board decided that the nuisance existed on the lot of the defendant, and the fact being so determined, it made no difference from what cause it arose; it was necessary and proper that it should be removed. The evidence was, therefore, properly rejected." Under a statute less explicit than that of Pennsylvania, regarding the effect of ordinances enacted thereunder, the supreme court of Georgia determined that an ordinance of the city council of Savannah, declaring the cultivation of rice injurious to the public health, was conclusive

upon the parties affected thereby: *Green v. Mayor of Savannah*, 6 Ga. 1. These cases are cited apparently with approval in *City of St. Louis v. Stern*, 3 Mo. App. 48; S. C., 9 C. L. N. 71, and perhaps they are, to some extent, at least, supported by *Dingley v. City of Boston*, 100 Mass. 557; *Crosby v. Warren*, 1 Rich. 385.

The power to declare an innocent and meritorious occupation a nuisance, or to conclusively determine that a hurtful and unlawful state of facts exists with regard to any person or property, is so dangerous to the property, and even to the liberty of the citizen, that it ought not, without a struggle, to be conceded to municipal boards, acting as they usually do, without notice to the parties in interest, without evidence, without knowledge of the general principles of law, and in the absence of any appellate tribunal to correct their errors, whether of law or of fact. The decisions do not all go to the same length. Each is, of course, confined to the circumstances of the case out of which it arose; but their general tendency is towards the restriction, if not to the absolute denial of this irresponsible and unlimited power, and towards the general rule that an ordinance of a city will not be permitted to transform into a nuisance that which is not so by statute, nor by common law, nor to conclusively decide that those facts exist which are necessary to constitute a nuisance. The citizen is allowed to show, if he can, that nothing exists, or has existed, which can with any propriety be designated as a nuisance, or that, if it exists, the city itself is responsible therefor: *Wreford v. People*, 14 Mich. 41; *Everett v. Council Bluffs*, 46 Iowa, 46; 11 West. Jur. 416; *Yates v. Milwaukee*, 10 Wall. 497; *Babcock v. City of Buffalo*, 56 N. Y. 272; *City of Chicago v. Laflin*, 49 Ill. 172; *City of Alleghany v. Heyl*, 11 C. L. N. 107.

The following is from an opinion of the supreme court of New Jersey, determining whether the action of a municipal board of health, declaring a lot to be a nuisance, could be shown to be unwarranted by the existing facts: "From the history of the proceedings, it appears that the before recited resolution of the board of health was regarded and was adjudged at the trial to be absolutely conclusive of the question embraced in its decision. The board had agreed to the proposition that the lot of the plaintiffs was a nuisance, and that ended the matter for all the purposes of the suit then trying. The resolution was looked upon as a judgment that was just as final as would have been the judgment of the supreme court of the state. It mattered nothing that the person whom the resolution was to affect had not been notified of the action about to be taken affecting his interest, and had therefore no opportunity of being heard; nor that it affirmatively appeared on the plaintiff's own case that no public nuisance in point of fact had existed on the property in question; or that a body of five persons had pronounced judgment without evidence on the representation of two of its members; or that such board had pronounced the lot itself to be a nuisance without specifying in what respect, so as to enable the owner to remove whatever was objectionable; or that the order, instead of being to abate a designated nuisance leaving it to the lot-owner to abate it in his own fashion, had directed the lot to be filled in to grade, notwithstanding all these omissions and errors which were obviously so flagrant as to leave in the action of this tribunal not the faintest semblance either in form or substance of a proceeding in an ordinary court of justice, was pronounced to be final and to import absolute verity. But this view of the efficacy to be given to this decision of the board of health, even if such board is to be regarded as a special tribunal, authorized by the legislature to pass upon the matter adjudged by it, is, I think, manifestly erroneous. It is not within the competence of legislation in this state to authorize any tribunal to render a judgment against the per-

son or property of a citizen without notice and an opportunity afforded him to be heard. If the charter of the city of Camden had declared that the board of health should have the power of rendering decisions similar to the present one, and under the same conditions of procedure, such provisions would have been entirely nugatory. A judgment in any court, without in any wise summoning the defendant, would be void, and not merely voidable. It is true that when the proceeding is in any of our domestic tribunals whose action is regulated by the common law, it will not be admissible to show the facts in a collateral way that the sentence was rendered against a defendant who was not duly in court, the rule introduced from the civil law being '*res judicata pro veritate accipitur*.'

"And this estoppel springs from the circumstances that in courts so constituted there is a remedy provided against errors of every description. But this rule which thus conclusively presumes that courts of this character had jurisdiction by means of due citation over the person of the suitor, does not apply to inferior and special tribunals not being courts of record, and whose methods of action are not in accordance with those of the common law; whenever the act of such a judicial body comes in question, its jurisdiction over the particular case adjudged is a mere matter *in pais*, and is open to inquiry by evidence. Such is the law even in its application to judgments of the highest courts of other states when sued upon in this state: *Moulin v. Insurance Co.*, 4 Zabr. 222. And the principle was strongly emphasized in *Hess v. Coal*, reported in 3 Zabr. 116, in which the point for decision was whether, in an action by husband and wife for dower *unde nihil habet*, a plea that dower had already been assigned by the orphans' court, and in which proceeding process had been served on the wife, she living apart from her husband, was a good bar to the action. This plea was not sustained on the ground that the husband had not been summoned, although the ground was taken that the judgment must be held to be conclusive in a collateral proceeding, Chief Justice Green saying, in the opinion read by him: 'It is not enough that the court have jurisdiction of the subject-matter, it must also have jurisdiction of the person. In every proceeding of a judicial nature it is essential that the person whose rights are to be affected, should be a party to the proceeding, and have an opportunity of making defense.' A number of cases are cited in this opinion in support of the doctrine, and in addition to those the following may be referred to with advantage: *Cook v. Darling*, 18 Pick. 393; *Smith v. Rice*, 11 Mass. 507; *Fisher v. McGirr*, 1 Gray, 1. The result then, on this head, is that even on the assumption that the power to adjudge the question of the existence of a nuisance in this case was lodged in this sanitary board, it acquired no jurisdiction of the matter in this particular case, inasmuch as the party proceeded against was not offered an opportunity to make defense. Nor is it any objection to this conclusion to say that the power to adjudge in these cases, if given to this body at all, is given unqualifiedly and without any requirement that there must be notice of the proceeding for the power to adjudge necessarily by implication, carries with it the obligation to give a hearing to the person to be affected by the decision. This has been repeatedly held in this state: *Youngs v. Overseers of Hardiston*, 2 Green, 518; *Turnpike Co. v. Hall*, 2 Harr. 337.

"This precise question, in the form in which it is now presented, was recently passed upon after a very full examination of the authorities in the supreme court of Massachusetts. The case to which I refer is that of the *City of Salem v. Eastern R. R. Co.*, 98 Mass. 431. It was a suit similar to the present one, to recover the expenses of an abatement of a nuisance, made by the city under

the adjudication of a board of health. No opportunity to be heard had been given to the property owner, but still it was claimed that the decision of the question of nuisance concluded him on the collateral proceeding to recover the money expended. To this position the court made this reply: 'But this court are of opinion that in a suit to recover expenses incurred in removing a nuisance, when prosecuted against a party on the ground that he caused the same, but was not heard, and who had no opportunity of being heard, before the board of health, such party is not concluded by the findings or adjudications of that board, and may contest all the facts upon which his liability is sought to be established.' Giving, therefore, to this resolution the utmost legal effect that can be ascribed to it by conceding to the sanitary board a judicial capacity in the premises, still its action must be regarded as entirely void inasmuch as it appears that it had no acquired jurisdiction over the plaintiffs in error. The proceeding was *coram non judice*, and as such was not merely voidable but was an absolute nullity. But to rest here would be to put this matter on too narrow a ground. There is an infirmity in all proceedings of this nature which lies deeper than the one just noticed. Assuming the power in this board derived from the legislature to adjudge the fact of the existence of the nuisance, and also assuming such jurisdiction to have been regularly exercised and upon notice to the parties interested, still, I think, it is obvious that in a case such as that before this court the finding of the sanitary board can not operate in any respect as a judgment at law would upon the rights involved. It will require but little reflection to satisfy any mind accustomed to judge by legal standards of the truth of this remark. To fully estimate the character and extent of the power claimed will conduct us to its instant rejection.

"The authority to decide when a nuisance exists is an authority to find facts to estimate their force and to apply rules of law to the case thus made. This is a judicial function, and it is a function applicable to a numerous class of important interests. The use of land and buildings, the enjoyment of water-rights, the practice of many trades and occupations, and the business of manufacturing in particular localities, all fall on some occasions, in important respects, within its sphere. To say to a man that he shall not use his property as he pleases, under certain conditions, is to deprive him *pro tanto* of the enjoyment of such property. To find conclusively against him, that a state of facts exists with respect to the use of his property or the pursuit of his business, which subjects him to the condemnation of the law, is to affect his rights in a vital point. The next thing to depriving a man of his property is to circumscribe him in its use, and the right to use property is as much under the protection of the law as the property itself in any other aspect is, and the one interest can no more be taken out of the hands of the ordinary tribunal than the other can. If a man's property can not be taken away from him except upon trial by jury or by the exercise of the right of eminent domain, upon compensation made, neither can he in any other mode be limited in the use of it. The right to abate public nuisances, whether we regard it as existing in the municipalities, or in the community, or in the land of the individual, is a common law right, and is derived in every instance of its exercise from the same source, that of necessity. It is akin to the right to destroying property for the public safety in case of the prevalence of a devastating fire or other controlling exigency. But the necessity must be present to justify the exercise of the right, and whether present or not must be submitted to a jury under the guidance of a court. The finding of a sanitary committee, or of a municipal council, or of any other body of a similar kind, can have no effect whatever for any purpose upon the ultimate dispo-

sition of a matter of this kind. It cannot be used as evidence in any legal proceeding for the end of establishing finally the fact of nuisance, and if it can be made testimony for any purpose, it would seem that it be such only to show that the persons acting in pursuance of it were devoid of that malicious spirit which sometimes aggravates a trespass and swells the damages. I repeat that the question of nuisance can conclusively be decided for all legal uses by the established courts of law or equity alone, and the resolutions of officers or of boards, organized by force of municipal charters, can not, to any degree, control such decision.

“Upon turning to the books, I do not discover that the precise point here considered has been directly presented in our own courts for judicial determination, but the view above expressed has obviously been acted upon in at least two decisions in proceedings in equity. The first of these cases is that of the *Manhattan Manf. and Fertilizing Co. v. Van Keuren*, 8 C. E. Green, 251. The facts before the courts were these: The complainants were manufacturing fertilizers which it was said emitted offensive odors so as to be a nuisance to the neighborhood. The charter of Jersey City gives power to the board of alderman to ‘declare what shall be nuisances in lots, streets,’ etc., and to provide for their removal. By force of this authority an ordinance was passed whereby ‘all slaughter-houses and other buildings, whence offensive smells were emitted, are declared to be nuisances, and the street commissioner upon complaint made is empowered to enter upon any premises to ascertain if a nuisance exist, and on ascertaining that it does, to give notice requiring its abatement within twenty-four hours, and if such notice be disregarded to proceed to abate it.’ By virtue of the right thus given the commissioner had entered on the property of the complainant, and had decided that a nuisance existed, and after notice was proceeding to abate it. The contention appears to have been made in this case that the decision of the commissioner on the question was conclusive; but the doctrine was emphatically repudiated, for the vice-chancellor in his opinion says: ‘In the view I take of this case the defendant acts at his peril. His own adjudication of the fact of a nuisance will not protect him as would the judgment of a court.’ And in the second of the cases above referred to, which is that of *Weil v. Ricord*, 9 C. E. Green, 169, a similar opinion on this subject evidently is the ground-work on which the conclusion of the chancellor is rested. The expediency, if not the absolute necessity of the prevalence of the rule of law above sought to be vindicated is conspicuously exhibited by the action taken under the city charter in the present case. The ignorant, hasty and indiscreet conduct of this board of health is an admonition not to be disregarded against listening to any claim that, under any circumstances the power of ultimate judgment over the law and facts with respect to the rights of persons or of property can be safely confided to other hands than those of the ordinary judicial tribunals. As this case stands before this court it appears that without right the city of Camden, through its officers, has entered upon the property of the plaintiffs in error, and without their assent altered its conditions, and that this suit is brought to obtain repayment of the costs of that trespass.” *Hutton v. City of Camden* 39 N. J. L. 126; S. C., 23 Am. Rep. 206.

CUOULLU v. LOUISIANA INSURANCE COMPANY.

[5 MARTIN, N. S. 464.]

THE SENTENCES OF FOREIGN COURTS OF ADMIRALTY are conclusive upon all the matters decided.

FOREIGN COURT OF ADMIRALTY—QUESTIONING AUTHORITY OF.—The right belongs to every court to examine whether the judgment or decree offered to it emanates from an authority competent by the laws of nations, to act in the matters on which it has pronounced judgment.

A NEW CONSTITUTION does not, it seems, supersede the prior constitution until put in operation by the legislature.

THE COURTS OF EACH NATION are the proper tribunals to interpret its laws, and their decisions must be followed in other countries.

THE REGULARITY OF THE PROCEEDINGS OF A FOREIGN COURT OF ADMIRALTY can not be gone into, if its action was in a cause wherein it had jurisdiction.

THE AUTHORITY OF A NATION CAN NOT EXTEND BEYOND ITS TERRITORY, except where the sea is a boundary, in which case it extends to the distance of a cannon shot from the shore.

A NATION'S RIGHT TO PROTECT ITSELF from injury is not restrained to its boundaries. It may watch its coast and seize vessels approaching with intent to violate its laws, although they are more than the distance of a cannon shot from its shores.

INSURANCE—ILLICIT TRADE.—Under a policy of insurance in which the insurers exempt themselves from liability for loss arising from illicit trade, they are not responsible for any seizure for illicit trade at any distance from the shore, where, by the law of nations, such seizure could be rightfully made.

THE EXTENT OF BELLIGERENT RIGHTS is defined by the law of nations. Any law going beyond these rights derives its authority from the nation which enacted it, and its violation must be punished under the laws of such nation.

A CONDEMNATION NOT SANCTIONED BY THE LAWS OF WAR, can not be considered one *jure belli*.

RIGHT TO PROHIBIT IMPORTATION.—A nation has the right to refuse to permit the importation of merchandise from any foreign country.

CONDEMNATION FOR ILLICIT TRADE.—A condemnation *jure belli*, and for a breach of municipal regulations will falsify the warranty by which the insurer was protected from loss from illicit trade.

APPEAL from the court of the first district. The opinion states the case.

Mazureau and Strawbridge, for plaintiff.

Eustis and Slidell, contra.

By Court, PORTER, J. This action is brought on four policies of insurance, executed by the defendants on goods on board of the schooner Felix, from the port of New Orleans to Soto la Marina, in the republic of Mexico. The petition sets out the

usual averments of loss, abandonment, etc., and prays judgment for the amount insured, viz., thirty thousand three hundred dollars.

The defendants pleaded the general issue. There was judgment in their favor in the court of the first instance, and the plaintiff appealed. The principal ground of defense, set up to the claim of the petition, is derived from a clause contained in the policy of insurance, by which the insured warrant the assurers "free from any charge, damage or loss, which may arise in consequence of engaging or having been engaged in illicit trade, at any time whatsoever."

To prove that the loss of the goods insured had arisen from one of the causes mentioned in the warranty, the defendant produced and read in evidence a decree of condemnation, pronounced by a court of justice in the republic of Mexico. On the trial, the plaintiff offered evidence to contradict the facts on which this sentence of condemnation was pronounced. The defendants contended, that the decree of the court was conclusive, in relation to all the matters on which it acted; and objected to the introduction of any proof in opposition to it. Of this opinion was the court, and excluded the testimony; the plaintiff excepted.

The question which the bill of exceptions presents, with every other in the cause, has been most elaborately argued. The appellant has contended on his part of the case: 1. That the sentences of courts of admiralty of foreign nations are not conclusive evidence in an action between the insurer and insured; and, 2. That admitting the rule to be that they are conclusive, the sentence of the court which was offered in evidence was not, because the tribunal had not competent authority to act in the matter on which it pronounced judgment.

The first point revives a question which has been as much agitated and discussed as any which has been presented to the tribunals of the United States. The weight of authority is so decidedly in favor of the conclusiveness of sentences of foreign courts of admiralty, in suits between parties standing in the relation of those now before the court, that we did not expect to see the subject stirred again. It is true this doctrine has always had its opponents and able ones; but the steadiness with which the supreme tribunals of several states in the Union, and that of the United States, have maintained it, notwithstanding the opposition, gives to their opinions a weight to which, in ordinary circumstances, they would not be entitled. In the

year 1816, the question came before this court, and the judges then presiding in it declared, in conformity with the doctrine generally received throughout the Union, that the judgment of a foreign court of admiralty was conclusive between the insurer and insured. This opinion has been ably, but on the best view we can take of the subject, unsuccessfully impugned, by the argument at the bar. The laws of Spain being, so far as it could be learned at the time of that decision, or as it has been shown now, silent on this matter, the court felt itself at liberty to adopt the doctrine which it considered most conformable to the other commercial usages and customs prevailing in the state; and in acting on the subject, with the choice of conflicting opinions in other nations, it adopted that which assimilated us to the rules prevailing in the greater number of our sister states. It was not ignorant that a different effect was given to these sentences in some of the continental states of Europe, but that rather proved the law of nations was unsettled on this point, than that the rule the court gave the preference to was not the true one. It might be as well said in Italy or France, that their jurists and courts were wrong, because the United States and England held a different opinion, as it is to argue here that we are in error, because in France and Italy they think differently from us. In questions of this kind we prefer the exposition of national law which may come from our own tribunals, to that of any foreign court or jurist, unless on an examination of the principles it rested on, we were perfectly convinced the foundation was unsound. There is another reason which has no inconsiderable weight with us. The more closely our rules on questions of commerce approach those of our sister states, the more facility do we extend to that intercourse and trade on which the prosperity of the state most materially depends; and this consideration can never be lost sight of by the court, where the legislature leaves us without positive law.

We deem it unnecessary, for it would be unprofitable, to go at length into an examination of the different arguments used at the bar, and show why they failed to produce that conviction on us they were intended to impress. Had they even made us greatly doubt, they would not have induced us to retrace our steps, and decide this case on a change of opinion. It is now ten years since that decision has been made. It has been known to the community, and the parties to this suit must be presumed to have contracted in relation to the law as expounded by the court of the last resort in the state. Under such circumstances,

nothing short of the clearest conviction on our part that we had been in error could authorize us to recognize a different rule, and apply it to the case before us. But it is contended that, however the general rule may be, the sentence of the court offered in evidence was not conclusive, because it was pronounced by a tribunal of incompetent authority.

The first question that meets us on the inquiry into the correctness of this position is, whether this court has the power to examine into the competency of the tribunal by whose sentence the condemnation was pronounced. We entertain no doubt that we possess such power. The great extent to which we carry our comity for these tribunals, and the influence we accord to their judgments, far from being an argument against their power renders the exercise of it indispensable to the correct administration of justice. That individuals, by taking on themselves the attributes of judicial power and clothing their acts of assumed jurisdiction with the forms of proceedings of courts of justice, could rightfully condemn the property and give to their sentences the effect which belongs to those of tribunals constituted by sovereign authority, is a proposition that requires no refutation. It is clear the right belongs to every court to examine whether the sentence offered to it emanates from an authority competent, by the law of nations, to judge of the matters on which it has pronounced: 4 Cranch, 269; 1 Rob. 144; 4 Id. 35; 5 Id. 255.

The competency of the tribunal whose sentence was offered in evidence has been assailed on two grounds: 1. That it was a tribunal established by the government of Mexico, antecedent to the formation of the federal constitution, and that its authority ceased with that event; 2. That the laws by which tribunals of marine jurisdiction were created in that country prescribed a different organization from that which appeared to belong to the court that condemned the property.

The plaintiff produced no proof in the court below in support of this ground, but he contends that the incompetency of the tribunal results from the evidence introduced by the defendants themselves. That evidence shows that tribunals of admiralty were established prior to the constitution; that by that instrument circuit courts were directed to be established, in which the jurisdiction of all prizes by sea and land (*presas de mar y tierra*), and the cognizance of all pursuits in relation to contraband goods, should be vested.

Whether, on a voluntary change by a people from one form

of government to another, the laws in force at the time of such change cease to have any effect, and the authorities by whom they are administered lose the power vested in them by the previous government before the succeeding one is organized and goes into effect, are questions by no means free from difficulty. The very general use of a positive provision on that subject, in the different constitutions which have been formed since the independence of these states, is certainly a strong argument to show that in the opinion of the framers of these instruments such a provision was necessary, and that without it a complete interregnum would be created, during which there would be neither laws nor officers to administer them. This argument is, however, by no means conclusive, and there are many who hold a contrary doctrine. It is true that a majority of the members who now compose this tribunal so decided in a case that came before it in the year 1821, and such, also, was the opinion of the late superior court of the territory of Orleans. But a majority of the persons who have at different times filled this court since its organization, seem rather to have thought that the constitution did not supersede the former government until put into operation by the legislature; and one of the judges declared that without a schedule this would have been the consequence. That the most radical change in form does not destroy the old government until the means are furnished of giving full effect to the new: *Bermudez v. Ibanez*, 8 Mart. 2; *Dufau v. Massicot*, Id. 289; *Bouthemy v. Dreux*, 10 Id. 1.

Two of the judges in this court retain the opinion they expressed in the case of *Bouthemy v. Dreux*, in relation to our own constitution; but we unanimously think that the question is by no means so clear and free from doubt as to authorize us to declare that the government and courts of another country, who come to a different conclusion in relation to the effect produced by a change from one form of government to another, did what they had no right to do; and that all their acts are null and void. They were the proper judges to construe their own constitution and laws, and this decision must be adopted as the true construction by other countries. The correctness of this principle is established by an irresistible course of reasoning in the case of *Elmendorf v. Taylor*, 10 Wheat. 160, decided in the supreme court of the United States. The chief justice, in delivering the opinion of that tribunal, observes: "No court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts

of Great Britain or France, or any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding."

That a construction has been given to the constitution of Mexico adverse to the position of the plaintiff is proved to our entire satisfaction. The acts of the court in continuing to administer justice after the adoption of the constitution, and before the organization of the circuit courts, is conclusive evidence of their opinion respecting their jurisdiction. In addition to this, the testimony of lawyers in the city of Mexico has been taken. One of them, a distinguished member of the profession, and holding a high situation in the government, after examining the proceeding, swears that the court which condemned the goods was a lawful tribunal, and that its proceedings were regular, and its jurisdiction undoubted, as the circuit courts had not, at the time the sentence was rendered, been established under the constitution. Such being the construction in Mexico, it must be the construction here, where the proceedings come collaterally before us.

The second point on which the competency of the tribunal is attacked, is derived from the terms of the law creating it. By this law, a Spanish ordinance contained in the fourth, fifth, sixth, and eighth laws of the eighth title of the sixth book of the Novissima Recopilacion, is prescribed as the rule to be followed in the organization of the tribunal, and its practice, except where it is in opposition to the laws of Mexico.

This ordinance has been minutely observed on by the counsel, and a close comparison of it with the actual organization of the court, as set forth in the proceedings, does certainly show a considerable variance between them. But we are as unprepared on this ground as the other to declare the court incompetent, for we have only part of the laws before us. That which establishes the tribunal declares that the ordinance is to be followed, except where the laws of Mexico differ from it. When the organization of the tribunal is shown to be different from that ordinance, we can come to no other conclusion than that the difference is produced by laws to which we have not access. Even if other laws besides the constitution were before us, it would be difficult for us to say that the tribunal was not rightfully and legally constituted. It is a conclusion to which no court can come, in regard to the organization of a tribunal in another country, without much hesitation, and without feeling that it is peculiarly liable to err. To form a safe judgment

it must have all the laws of the country before it, and it must be satisfied that it is so well acquainted with the jurisprudence of that country, that the same construction is given to the laws as they receive in the place where they are made. Both of which it is difficult for a foreign tribunal to be sure of. Our ideas on this head may be illustrated by supposing a Spanish tribunal to inquire into the constitution of the court of king's bench in England, and its powers, in order to show how it got jurisdiction in civil matters, and how far that jurisdiction extended.

But in this case we are not left to these considerations. It has been proved by the evidence of lawyers residing in the city of Mexico, that the tribunal was competent, and its proceedings regular. The testimony was much commented on, but nothing we have heard in argument has destroyed or shaken its credit. It appears to have come from persons of respectability. It was taken by deposition, and these depositions were opened, as the indorsement on them shows, some time before the trial. If the plaintiff believed they were improperly obtained, or that the witnesses erred through ignorance or corrupt motives, it could not have been difficult to disprove them. In every point of view, then, we are satisfied that there has not been enough shown to authorize this tribunal to declare that the court which condemned the goods was incompetent.

The same observations apply to the objection that this was a prize, and not an instance court. The proof establishes the tribunal had authority to pronounce the judgment set forth in the proceedings. What is the nature and extent of that judgment has been much controverted, and will be the subject of examination hereafter.

A great deal was said in relation to the irregularity of the proceedings. The want of a proper law officer to advise, the assistance of an auditor, and not an assessor; the necessity of two sentences, according to the laws of Spain, etc. Some of these objections might, perhaps, be well founded if we were an appellate tribunal to review the sentences of the Mexican courts of admiralty. But we have no such power, and consequently can not look into these errors. They were matters for the consideration of the judges who pronounced the sentence, and their decision on them is final: *Rose v. Himely*, 4 Cranch, 278.

The plaintiff, however, further contends that admitting the

sentence to be conclusive as to everything on which it acts, still, he must recover on the following grounds:

I. The seizure was made on the high seas, not in the port of Soto la Marina.

II. The whole of the goods seized were condemned *jure belli*, or if not the whole, a part were.

1. The declaration of the captain, officers and crew of the schooner, taken before the consul of the United States at Alvarado, states that they sailed from New Orleans, and anchored in Soto la Marina Roads, on the seventh of September, and that on the same day a boat came on board from the Mexican vessel Tampico, and took forcible possession of her. In the examination of the captain, taken before the court, he renews the declaration that he was at anchor when he was seized, but states that it was in the port of Soto la Marina, and adds that at the time of the seizure, passengers who came in the ship had been landed.

It is admitted in the agreement that the place where the schooner was seized is some distance from that where vessels usually anchor when they discharge their cargoes at that port. That it was about four leagues from the shore, and that the coast is low and flat. Whether this was a seizure on the high seas or not, is immaterial in the view which the court has taken of the rights of the parties. Before stating those views, a position assumed by the plaintiff must be examined. It is contended by him that from the terms of the policy the defendants took all risks until the goods were landed.

The terms of the policy certainly are that the insurer is to be responsible until the goods are landed. But the designation of time during which the responsibility should last can only extend to the risks for which the insurer became responsible, not to those excluded by the warranty. They are exceptions introduced to the general terms of the contract, and their force and meaning must be determined by a consideration of the extent to which this exception goes; not by the general words of the policy, the effect of which it was the object of the warranty to guard against. Whether the seizure was made in such a place as it might be rightfully made, for illicit trade, is the true question, not whether the goods were landed. According to the construction of the plaintiff, the warranty in the policy was of no use to the insurers. For if they were responsible for all risks of seizure for illicit trade until the goods were landed, notwithstanding the warranty, then the insertion of the

exception did not alter their situation, as without such a clause their responsibilities would have ceased with the landing of the goods.

A law of Spain was much relied on to prove that the jurisdiction exercised in this case was beyond the territorial limits of the government of Mexico. The law is found in the ordinance of Corso already quoted. It is entitled the rules which are to be observed in case of prize. It declares that the immunity of the coast shall not, as heretofore, be marked by the doubtful and uncertain distance of a cannon shot, but by the distance of two miles; that all prizes made within that distance shall be judged of by the commandant of the port into which the prize is brought; and that, if made beyond it, they shall be taken cognizance of by the tribunal of the captor: *Novissima Recop.*, Liv. 6, tit. 8, law 5.

That this ordinance marks the extent of territorial jurisdiction of the sovereign of Spain, and that the seizure here made was beyond these limits, can not be questioned. But with these admissions the question still remains, whether the seizure was not made in the exercise of a right, which every nation enjoys, to prevent its laws being evaded. If it was, it is immaterial in our view of the subject, whether it was made within the limits or not. Strictly speaking, the authority of a nation cannot extend beyond her own territory. By the common consent of nations this authority has been enlarged, where the sea is the boundary, to the distance of a cannon shot from the shore. Within these limits foreigners are protected, and prizes cannot rightfully be made of their vessels by enemies. But the right of the nation to protect itself from injury, by preventing its laws from being evaded, is not restrained to this boundary. It may watch its coast and seize ships that are approaching it with an intention to violate its laws. It is not obliged to wait until the offense is consummated before it can act. It may guard against injury, as well as punish it. If indeed, in the exercise of this right, an unreasonable range was taken, other nations might object. But so long as it is confined to the seizure of vessels entering the port for which they are destined, it will not, it is presumed, form a just ground of complaint. Our own legislation authorizes revenue cutters to visit vessels four leagues from the coast; and the acts of congress on this subject are a clear expression of the opinion of our government, that nothing in the law of nations prohibited them to confer such power on its cruisers. The case of *Church v. Hubbard*, 2 Cranch. 187,

decided in the supreme court of the United States, is almost that before the court. It was there held that the insurer under warranty, such as that inserted in the policy, was not responsible for a seizure made four or five leagues from the coast, although it was admitted the territorial jurisdiction did not extend further than a cannon shot from the shore. The cases cited by the appellant, from Taunton's Reports, were decided on a different form of policy. The warranty there was "free from capture and seizure in the port, or ports, of discharge." By these expressions the parties excluded a particular place from the risks assumed by the insurer under the policy. By the warranty here, the insured took upon himself the risk of seizure for illicit trade at any distance from shore, where, by the law of nations, such seizure could be rightfully made: 2 Cranch, 186; 2 Taun. 499; 4 Id. 887; 9 Wheat. 371; 11 Mass. 104.

The second ground assumed by the plaintiff on this part of the case will be best understood by dividing it. We will first consider the proposition that the whole of the goods were condemned in the exercise of a belligerent right. The distinction between the rights which a nation acquires in consequence of her being at war with another, and those which she possesses as sovereign within her own limits, seems to us so clear that there can be little doubt in relation to it. The law of nations having defined the extent of belligerent rights, any law of a particular country which goes beyond these rights must necessarily derive its authority from the nation within his own limits, and a punishment for a breach of this law must be referred to a violation of municipal regulations, for it is only as such that it had any force, or that punishment could take place under it.

In regard to the particular regulation under which this property was condemned it is beyond doubt that it was a municipal one, and that it derived its authority from the power which the nation had within her own territory, not from her rights as being at war with another country. The decree of the Mexican government prohibits the admission into their ports, not only of goods and merchandise, the production and manufactures of Spain, but also of all merchandise which may have been brought from the ports of that country, no matter what its origin, or to whom it may belong. Or, in other words, they condemn even neutral property, of neutral origin, if it comes from Spain or her dependencies. This was a right which the law of war did not confer, consequently a condemnation under it can not be considered one, *jure belli*.

It was urged that the motives avowed by the government in passing the decree show plainly that it was intended to distress the enemy, and that as the measure arose out of a state of war, a condemnation for a breach of the law must be referred to the same source. Admitting this to be their motive, and we believe it such, the consequence contended for does not follow. Sovereigns may make what regulations they please within their own territories, and no matter what may be the motives, the source from which the regulation derives its force must be the test by which the law is to be designated, not the motives that induced its passage.

The cause of *Faudel v. Phœnix Insurance Company*, 4 S. & R. 29, decided in the supreme court of Pennsylvania, was much relied on by the plaintiff. It arose out of a sentence of condemnation pronounced under the Milan and Berlin decrees, and the assurer contended he was not responsible, as by the policy he was warranted free from illicit or prohibited trade. The court decided that a condemnation under that decree, though the vessel was seized in entering the port, was not a condemnation for illicit or prohibited trade, but a condemnation *jure belli*, and that the insured could recover.

A great deal of the argument of the counsel and the reasoning of the judges were directed to show that the Berlin and Milan decrees were a violation of the law of nations, and to a certain extent there is no doubt they were. Undoubtedly France had no right to say neutral nations should not trade in the manufactures of her enemy, and that if they did their property would be captured on the high seas. But we agree with the counsel for the defendants that parts of these decrees were not contrary to that law. A belligerent has the right to say he will not permit the merchandise from an enemy's country to be imported into his. He can not only exercise this power in time of war, he may do it in a period of profound peace. Examples of the latter kind are very numerous and the authority to do so is unquestionable. To refuse it would be tantamount to a declaration that the nation who passes such a declaration is not independent. For if she be, who can question her right to regulate her internal concerns as she pleases.

The judges who decided this case, felt the weight of this principle. They admitted the right to pass such a law as has been just spoken of, and the right to enforce it at an indefinite distance from the shore; but they decided against the assurer, because the seizure and condemnation had not been made on the

ground that the insured was about to import prohibited goods, but that they were British manufactures. Being thus satisfied that a condemnation under these decrees of the Mexican government will falsify the warranty, we proceed to examine whether, in point of fact, any or all of the goods insured were so condemned.

There were two sentences pronounced by the court. The first, after reciting that the cargo is composed of two hundred and ninety-five barrels of wine, one hundred and twenty-three boxes of wax, of hardware, and other effects, proceeds to detail the proofs, by which it appears that the wine and wax came from the port of Havana, and concludes as follows: "That we ought to declare, and do in fact declare, as good prize, not only the before-mentioned American schooner, the Felix, but also the wine and wax referred to in the proceedings with the marks there given. That this condemnation should also extend to the other forty-five boxes of wax which are found on board the said schooner, and all the other productions, merchandise and effects, which shall be proven to be of Spanish origin, proceeding from any port of that nation, or of those prohibited," etc.

The second decree was preceded, according to the practice of the Spanish tribunals, by a report of the auditor or assessor, who states that the former decree respecting the schooner Felix should be confirmed with the exception of a billiard table, a still, ten hampers of empty bottles and a box of books; they not being contraband, nor proved to be brought from the port of Havana in the said schooner, nor Spanish property, nor the production nor manufactures of the enemy, in which qualities and prohibitions (*cuyas calidades y prohibiciones*) are comprehended the other effects which are condemned as good prize, according to our revenue laws and the declaration of war against Spain and her dependencies.

After stating some of the proceedings which had already taken place in the tribunal, the assessor adds: "From which proceedings result most clearly the legal causes of seizure, viz., the national qualities of some articles and the sailing of the vessel from a port which was under the domination of Spain."

The junta, or court, on this report, gave a final sentence, in which, after reciting the previous proceedings, they declare that "having read and taken into consideration the antecedent opinion of the assessor, and discussed all the points, with which we unanimously agree, conformably to what is there exposed, confirming, as we do confirm, the condemnation of the schooner

Felix and her cargo as good prize, excepting from said penalty ten hampers of empty bottles, a still, a billiard table, and a box containing five bibles and four new testaments." It has been contended that these sentences do not embrace the whole of the cargo, that only a part of it is condemned.

But on this branch of the subject the court has no doubt. The original sentence condemns the wine, and wax, and such other articles as might be found liable to condemnation. The report of the assessor confirms this sentence, except in relation to a still, a billiard table, some empty bottles, etc. If it had been the opinion of the assessors that nothing more had been condemned than the wine and the wax, and that nothing more should be, the exceptions were unnecessary; for a confirmation of the original sentence, supposing it limited to the wine and the wax, would not have embraced them. The final sentence, however, places this matter beyond argument. It condemns the schooner and her cargo, with the exception of certain articles there mentioned. Consequently, every article of which the cargo was made up, and which is not excluded by the exceptions, is condemned.

The report of the assessor already referred to, which is adopted by the court as the basis of its last decision, after stating that certain goods were acquitted because they were neither articles of contraband nor proved to be brought from the port of Havana, nor Spanish property, nor the productions or manufactures of Spain, proceeds to state that in these qualities and prohibitions are comprehended the other effects condemned. It was argued that as the wax and wine were condemned in the first sentence for a breach of municipal law, and as new ground that of being enemy's property is inserted in the second, as a cause of condemnation, that the fair construction to be given to these decrees is that all the goods embraced by the last judgment which were not included in the first must be considered as seized and forfeited for the additional reason given in the sentence; and that for this portion of goods the insurers are responsible, as the warranty does not exclude war risks.

But the second sentence is in the conjunctive. It condemns the whole for all the causes therein mentioned. Consequently, it condemns them for each of these causes, and one of them is a breach of municipal law. If there were any inconsistency in the two decrees, or if the different reasons assigned in the last one could not be reconciled with each other, then, perhaps, it would be true to say that the several causes of condemnation

must be referred to the different portions of which the cargo was made up. But there is no such contradiction; they may well stand together. The goods might be enemy's property, and also come from the Havana. It is not impossible that between the first and second sentence proof was obtained which brought the whole cargo within the reason given in the last decree. We, at least, are bound to presume so; for so the sentence has said, and we can not contest its verity. But admitting this proof was not obtained, and that the wine and wax must be considered as condemned from the causes mentioned in the first decree, and no other, that does not weaken the position that the rest of the goods were not only enemy's property, but brought from an enemy's port. The decree condemns all the cargo for all the reasons for which it could be condemned; proving that part of it came within one of these reasons does not establish that the remainder was condemned for a single cause, when the words of the sentence say they are within all.

It is, therefore, ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs.

In the case of *Vandenhoevel v. The United Insurance Co.*, 1 Am. Dec. 180, it was held that the decree of an admiralty court was not conclusive upon the matters decided, but this decision seems to be opposed to the weight of authority: *Messier v. Amery*, Id. 316; *Jenkins v. Putnam*, Id. 594; *Stewart v. Warner*, 2 Id. 61; but see *Williamson v. Tunno*, 2 Id. 654.

SAUL v. HIS CREDITORS.

[5 MARTIN, N. S. 509.]

AN INTENTION TO REPEAL EXISTING LAWS is not presumed.

SUBSEQUENT STATUTES DO NOT ABROGATE former ones by containing different provisions on the same subject; they must be contrary to produce such an effect.

THE LAWS OF SPAIN concerning acquisition by husband and wife after marriage considered and explained.

THE CONSTRUCTION GIVEN BY COMMENTATORS to the laws of Spain, and acquiesced in by its courts and sovereign, makes as much a part of the law of Spain at this day as if the statute had been modified by the legislature.

THE JURISPRUDENCE, OR COMMON LAW, of some nations may be found in the decrees of their courts; in others it is furnished by private individuals eminent for learning, integrity and wisdom.

THE OPINIONS OF THE JURISCONSULTS OF SPAIN obtained an authority unequalled in any other country.

CONTRACTS MADE IN OTHER COUNTRIES must generally be enforced according to the principles which govern the contracts in the places where they were entered into; but no nation or state will to its own injury enforce such contracts, nor will it enforce them when they are prohibited by the provisions of its positive laws.

A REAL STATUTE IS ONE which regulates property within the state where it is in force.

THE REAL STATUTE OF THE SITUATION prevails over the personal statute of the domicile.

A PERSONAL STATUTE is one which follows and governs the party subject to it wherever he goes.

DEFINITIONS OF REAL AND PERSONAL STATUTES quoted and considered.

CONFLICT OF LAWS.—In all matters of doubt concerning which law ought to prevail, the court which decides will prefer the laws of its own country.

A STATUTE GOVERNING the property rights of husband and wife is not a personal statute; but is a real statute.

IF A HUSBAND AND WIFE REMOVE AFTER THEIR MARRIAGE, their subsequent acquisitions will, in the absence of an agreement to the contrary, be controlled and distributed by and under the laws of the country into which they thus removed.

APPEAL from the court of the first district. The opinion states the case.

Grymes and Hennen, for Astor.

Mazureau and Rawle, for Saul & Sons.

Morse, for Brown.

Eustis and Livermore, for the appellants.

By Court, PORTER, J. The tableau of distribution filed by the syndics of the insolvent was opposed in the court of the first instance; and the opposition being sustained, an appeal has been taken to this court, by the syndics, by the bank of the United States, the bank of Orleans and the bank of Louisiana.

The claims admitted by the judge *a quo*, and which are now contested here, are: 1. That of the children of the insolvent who claim as privileged creditors for the amount inherited by them from their deceased mother; 2. That of John Jacob Astor, of New York, who avers that he is a creditor of the insolvent for the sum of sixty-four thousand dollars, and that he has a privilege on seven hundred and fifty-one shares of stock of the bank of Orleans, which were pledged to him, and now make a part of the estate surrendered; 3. That of Alexander Brown & Sons, of Baltimore, who also assert a privilege on bank stock, which they state was pledged to them by the insolvent, for the security of a loan of nine thousand dollars and upward.

The different questions of law arising on these claims have

been argued with an ability worthy of their importance. Some of these questions are now presented for the first time for decision; and those which have been already before the court, and acted on, on other occasions, have been examined with so much care by the counsel, and have received such additional light from the laborious investigation bestowed on them that they come upon our consideration with as much freshness as if this was the only time our attention had been drawn to them.

We shall take them up in the order in which they have been already stated, and first as to the claim of the insolvent's children. From the facts admitted by the parties, which admission makes the statement on this appeal, it appears: That Saul and his wife intermarried in the state of Virginia, on the sixth of February, 1794, their domicile being then in that state; that they remained there until the year 1804, when they removed to the now state of Louisiana; that they fixed their residence here, and continued this residence up to the year of 1819, when the wife died; that after their removal from Virginia, and while living and having their domicile in this state, a large quantity of property was acquired, which, at the death of the wife, remained in the possession of her husband, the insolvent.

The children claim the one half of the property, as acquêts and gains, made by their father and mother in this state. The appellants contend that, as the marriage took place in the state of Virginia, by whose laws no community of acquêts and gains was permitted, the whole of the property acquired here belonged to the husband.

This statement of the matter at issue shows, that the only question presented for our decision is one of law; but it is one which grows out of the conflict of laws of different states. Our former experience had taught us that questions of this kind are the most embarrassing and difficult of decision that can occupy the attention of those who preside in courts of justice. The argument of this case has shown us that the vast mass of learning, which the research of counsel has furnished, leaves the subject as much enveloped in obscurity and doubt as it would have appeared to our own understandings, had we been called on to decide, without the knowledge of what others had thought and written upon it.

Until the discussion of this cause, it was generally understood by the bar and the bench in this state, that the question now agitated was well understood in our jurisprudence, and that from the period married persons from other states moved into

this, the property acquired became common, and was to be equally divided between them at the dissolution of the marriage. We have not, therefore, been insensible to the argument so strongly pressed on us, that the question being already settled by the decisions of the tribunal of last resort in the state, the subject ought not to be opened again, and that the most important interests of society require, there should be a time when contested points of jurisprudence may be considered as at rest; but these considerations are not in this case of sufficient weight to preclude a re-examination of the principles on which the doctrine already stated has been established. A sufficient period has not elapsed to enable it to derive much authority from the acquiescence of others. The decision of the court can not be supposed to have influenced parties entering into the marriage contract, or greatly to have affected any important interests in society. It applied only to married persons emigrating from other states, whose exertions or industry can not be supposed to have been much changed by the anticipation of the property going in one direction or the other; whose habits were formed before they came here, and no doubt remained the same after their migration as before. We shall, therefore, proceed to the examination of the question, as if the case was now presented for the first time, and, we trust, without any bias which might be supposed to exist in our minds, from the opinions we have already expressed.

The investigation we are about to make, will be best conducted by first examining our own statutes. The old civil code provided, that every marriage contracted within this state, superinduces, of right, partnership or community of acquests and gains: Civ. Code, 336, art. 63. Our revised code repeats this provision, and adds another, that a marriage contracted out of this state between persons who afterwards come to live here, is also subject to the community of acquests, with respect to such property as is acquired after their arrival: Code, 2370.

If the acquests and gains, in respect to which the present suit exists, had been made under the dominion of the law last cited, there would be an end to any dispute about their distribution; but the marriage of the insolvent and his wife was dissolved by the death of the latter, before that law was enacted. It has been contended that, as the article first cited provides for a community of acquests and gains on all marriages contracted within the territory, it is an evidence the legislature did not intend there should be a community on marriages made without;

inclusio unius, est exclusio alterius. It would be giving too much weight to the argument *contrario sensu*, to adopt this construction. If the subject were one on which there had existed no previous legislation, it would certainly be fair to contend, that as the law-maker has affirmatively declared particular cases not enumerated should produce certain effects; this affirmative included the negative, that other cases not enumerated should not produce these effects; though even then, this reasoning which is founded on presumption might yield to other circumstances by which that presumption could be repelled. But when there already exists positive legislation, on the same subject-matter, providing for the very case which it is presumed is excluded, the argument loses almost entirely its weight. The law must then be interpreted by a well known rule of jurisprudence, that an intention to repeal laws can never be supposed; that subsequent statutes do not abrogate former ones by containing different provisions on the same subject; they must be contrary to produce such effect. This rule which is true in relation to all laws, is more particularly applicable to our codes, which were only intended to lay down general principles, and provide for cases of the most common occurrence. If, then, the provisions in our code can not be considered to have repealed the former law, no argument can be drawn from them as to the intention of the legislature to do so, or their opinion on this subject. It is more than probable their thoughts were not turned to a case which is not of frequent occurrence. If they had intended to act on it, as the matter was, to say the least, doubtful, they certainly would not have increased these doubts by leaving their will to be inferred from an affirmative regulation on the same subject, but in relation to a different state of things. We are bound to believe they would have legislated directly on it, and have positively declared, as they have since done, what the rule should be, when people married in another country and removed into this.

It being clear then that our own statutes furnish no guide for the decision of this question, recourse must be had to the former laws of the country. The positive regulations of Spain on this subject are contained in two laws: one of the *Fuero Real*, and the other of the *Partidas*. That part of the law of the *Partidas*, which directly applies to the case before the court, is in the following words: *E dez imos, que el pleyto que ellos pusieron entre si, deve valer en la manera que se avinieron ante que casassen, o quando casaron; e non deve ser embargado*

por la costumbre contraria de aquella tierra do fuesen a morar. Eso mismo seria, maguer ellos non pusiessen pleyto entre si; ca la costumbre de aquella tierra do fizieron el casamiento, deve valer, quanto en las dotes, e en las arras, e en las ganancias que fizieron; e non la de aquel lugar do se combiaron: P. 4, tit. 11, ley 23. “And we say that the agreement they had made before or at the time of their marriage ought to have its effect in the manner they may have stipulated, and that it will not be avoided by the custom of the place to which they may have removed. And so we say it would be, if they had not entered into any agreement; for the custom of the country where they contracted the marriage ought to have its effect as regards the dowry, the *arras*, and the gains they may have made; and not that of the place to which they may have removed.” Some verbal criticism has been exercised on this law. It is contended by one of the parties, that it only intended to provide for the gains made before the removal of the married couple; or, at all events, that the words used leave the sense doubtful. By the other that it regulates all, whether made before or after they left the country in which the marriage took place. The expressions used, though not free from all ambiguity, as the appellants have argued, we think ought to receive the construction for which they contend. The law was so understood by the commentators of that day, and the preceding parts of it, compared with the clause in which the obscurity is said to exist, serve to support this interpretation.

If these provisions in the *Partidas* stood alone, they would admit of a more favorable construction in support of the ground assumed by the counsel for the syndics than they can receive when taken in connection with the law of the *Fuero Real*, which is in the following words: *Toda cosa que el marido y muger ganaren o compraren, estando de consuno hayanlo ambos por medio, etc.: Novissima Recop., lib. 10, tit, 4, ley, 1.* “Everything which the husband and wife may acquire while together, shall be equally divided between them.”

The codes in which these laws are found, were composed under the authority of Ferdinand the Third and his son, Alphonso the Wise, nearly about the same time. The *Fuero Real* was published in the year 1255. The *Partidas*, although completed in 1260, was not promulgated until nearly a century afterwards. By the Spanish writers, the former is considered, with respect to the latter, what the Institutes of Justinian are to the *Pandects*; and it has been admitted, that they may mutually aid in the interpretation of each other.

We have then two statutes presented for construction, one of which, not in terms the most clear, directs that the custom of the country where parties contract marriage, should regulate their rights in respect to acquests and gains; and another, which declares that everything that husband and wife may gain or purchase, shall be equally divided between them.

If the question as to the true interpretation of these laws now arose for the first time, we should hesitate what construction to put on them. Either taken singly, and according to the letter, goes the whole length for which each of the parties before us contends; but before examining them to ascertain what conclusion we should come to, if left to our judgment unaided by the opinions of others, it is proper we should endeavor to learn what construction was put on them in the country where they were made. On whatever side the weight of authority should be found to preponderate, we may certainly adopt it. They who have had these laws for nearly five hundred years before they passed to us, must, we feel, have more knowledge of the intention and meaning of their own legislation than we at this remote period of time, who have come to a knowledge of them but, as it were, of yesterday, can possibly possess.

Nothing can be more satisfactorily shown than the opinion of the commentators on the statutes of Spain in relation to this particular subject. From the time Gregorio Lopez published his work on the Partidas, in the year 1555, down to Febrero, in the year 1781, the writings of no jurists of that country have been produced to us, who treats of this matter, that does not declare that the law of the Partidas, already cited, must be limited to property acquired in the place where the marriage is contracted, and that it does not extend to acquisitions made in another country, to which the parties may have removed, where a different rule should prevail. In the long list of writers, who have been cited in support of this doctrine, are to be found some of the most illustrious of whom the middle ages could boast: James of Arena, Gulielmus de Cuneo, Dynus, Raynaldus, Jean Favre, Baldus, Alciat, and Ancharanus, Gregorio Lopez, on the 4 Partidas, tit. 11, law 24; Matienzo Commentaria, lib. 5, tit. 9, Nos. 73 and 74; Febrero, p. 2, lib. 1, cap. 4, sec. 2, No. 62.

Trying the question, therefore, by authority, no doubt can exist on which side it preponderates, in the country where the statute was passed. Admitting, therefore, for a moment, that the letter of the law of the Partidas was violated by the con-

struction given to it by the commentators, that violation acquiesced in for centuries by lawyers, courts and the sovereign authority of the country, makes as much a part of the law of Spain at this day as if the statute had been modified by the power in the state, in whom the right of legislation was vested. In looking into the laws of any country, we stop at the threshold, if we look no further than their statutes; and what we should see there, would, in most instances, only tend to mislead. In every nation that has advanced a few steps beyond the first organization of political society, and that has made any progress in civilization, a more extensive and equally important part of the rules which govern men is derived from what is called in certain countries common law, and here jurisprudence.

This jurisprudence, or common law, in some nations, is found in the decrees of their courts; in others, it is furnished by private individuals, eminent for their learning and integrity, whose superior wisdom has enabled them to gain the proud distinction of legislating, as it were, for their country, and enforcing their legislation by the most noble of all means, that of reason alone. After a long series of years, it is sometimes difficult to say whether these opinions and judgments were originally the effect of principles previously existing in society, or whether they were the cause of the doctrines, which all men at last recognize. But whether the one or the other, when acquiesced in for ages, their force and effect can not be distinguished from statutory law. No civilized nation has been without such a system. None, it is believed, can do without it, and every attempt to expel it, only causes it to return with increased strength on those who are so sanguine as to think it may be dispensed with: Duponceau on Jurisdiction, 105.

Spain, who was among the first of the European nations that reduced her laws into codes, and who carried that mode of legislation farther than any other people, early felt the necessity of a jurisprudence which would supply the defects and soften the asperities of her statutes. The opinions of her jurisconsults seem to have obtained an authority with her of which the history of no other country offers an example. So early as the fifteenth century a law was passed regulating the authority which belonged to the opinions of Bartolus, Baldus, Juan Andrea and Abad. That law was, it is true, afterwards repealed by the first of Toro, and directions given that in case of doubt as to the true interpretation of the statutes, recourse should be

had to the sovereign himself. What was the practical operation of this last statute our researches do not enable us positively to state. It does not, however, seem to have made much change in the practice of their courts; for in the year 1713, we find an *auto acordado* in respect to the laws that should be followed in the decision of causes, in which it is stated as a great inconvenience that the tribunals of justice had resorted to foreign books and authors to the depreciation of their own jurists, who, with great knowledge, had explained and interpreted their laws, ordinances and customs. But admitting that after the promulgation of the law of Toro, the opinions of these jurists had not the weight they before received, and that in all unsettled cases recourse was had to the sovereign himself; when we find that nearly four hundred years after, the writers on the laws of Spain refer to no decision of their king and council on this point, express no doubt about it, and quote the opinions of jurists who wrote nearly the same length of time before them, what conclusion can we come to but that no doubt did exist on the subject in Spain. That the whole nation acquiesced in the opinions of those who had early interpreted their statutes, and that the tacit consent of the sovereign himself must be presumed given to a construction which he had the power to change, but in which it is not shown he made any alteration: *Novissima Recop.* lib., 3, tit. 2, leyes 3 and 11.

It is most clear, then, that this interpretation which limits the law of the Partidas to the gains made in the country where the marriage was contracted, and excludes from its operation property acquired after a change of residence, comes to us recommended and fortified by every sanction that can give it value in the minds of those who sit in judgment, and whose duty it is to pronounce what the law is, not what it ought to be.

The appellants, however, contend that, although such may be the construction given to the statute in Spain, that construction is not binding on the court, because this is a question of jurisprudence not peculiar to any distinct nation, but one touching the comity of nations and embracing doctrines of international law, on which the opinions of writers not living in Spain are entitled to equal weight with those who professedly treat of her laws.

The strength of the plaintiff's case rests mainly on this proposition, and it is proper to examine it with the attention which its importance in the cause requires. But though of importance, it is not of any difficulty. By the comity of nations a rule does

certainly exist that contracts made in other countries shall be enforced according to the principles of law which govern the contract in the place where it was made. But it also makes a part of the rule, that these contracts should not be enforced to the injury of the state whose aid is required to carry them into effect. It is a corollary flowing from the principle last stated, that where the positive laws of any state prohibit particular contracts from having effect, according to the rules of the country where they are made, the former should control. Because that prohibition is supposed to be founded on some reason of utility or policy advantageous to the country that passes it, which utility or policy would be defeated if foreign laws were permitted to have a superior effect. On the very subject-matter now before us the writers who treat of it, although disputing about almost everything else, agree in stating that a real statute, that is, one which regulates property within the limits of the state where it is in force, controls personal ones which follow a man wherever he goes; indeed, it has been expressly, and with great propriety, admitted in argument that where the personal statute of the domicile is in opposition to a real statute of situation, the real statute will prevail: Boullenois, *Disc. Prelim.* P. 21; Id., *des Demis.* quest. 6, 163; Bouhier, *Sur la Coutume du Duché de Bourgogne*, cap. 23, 461; Rodenburg, *La de statutor, diversit.*, tit. 2, cap. 5, No. 6.

If this be true, the question whether the opinions of foreign jurists shall control those of the country where the statute is passed is at once settled. If the right of a nation to pass the statute which will affect a contract made in another country, be admitted, the right can not be contested to her to say whether she has done so or not. She surely is the best and safest expounder of her own laws. And we repeat here, what we said a few days since, on nearly the highest authority to which we could refer: "That no court on earth, that professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain or France, or any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal, by which that misunderstanding was to be corrected:" 10 Wheat. 159.

And if we did recur to the jurists of France and Holland for information, what would we get in place of the well-established rules in Spain? Much to confuse and little to enlighten us. We should find great learning and ingenuity exercised by some to show that the law which regulates the rights of property among

married persons is a personal one, which follows the parties wherever they go. By others, that it is real, and limited to the country by which it is made. But not one of them denies the power in a nation to pass a law such as has been lately enacted by the state of Louisiana, that a married couple moving into it from another state shall be governed by her laws as to their future acquisitions. None of them professes to comment on the laws of Spain, which her jurists say have the same effect with our late statute. They are not even mentioned by them. How wholly unsatisfactory, therefore, any general reasoning must be, on different customs and usages, to prove that the law of the *Fuero* is personal and not a real statute, we need not say.

With this view of the subject, we might conclude. But as it is always satisfactory for this court to feel that the authority which governs it is founded in truth, we shall proceed to examine the grounds on which the opinions of the Spanish jurists have been so strongly assailed. In doing so, we are led into an examination of the doctrine of real and personal statutes, as it is called by the continental writers of Europe; a subject the most intricate and perplexed of any that has occupied the attention of lawyers and courts; one on which scarcely any two writers are found to entirely agree, and on which it is rare to find one consistent with himself throughout. We know of no other matter in jurisprudence so unsettled, or none that should more teach men distrust for their own opinions, and charity for those of others.

Holland and France appear to be the countries where the greatest number of these questions have arisen, and where the subject has excited most attention. The doctrine which they denominate that of real and personal statutes is not, as it might, from the terms used, be supposed, confined to written and positive law; but it is applied also to unwritten laws or customs, by which the state or condition of man is regulated, his contracts governed, or his property distributed at his death. It professes to furnish the rules which are to govern men in civil matters when they pass from one country to another, and to distinguish and decide in all cases where the law of domicile and that of origin differ; where the rules of the place of contract and its execution conflict; where the countries in which a marriage is contracted and dissolved have different regulations; or where, on the decease of the owner, his property is situated in several places having different rules as to its distribution.

According to the jurists of those countries, a personal statute is that which follows and governs the party subject to it wherever he goes. The real statute controls things, and does not extend beyond the limits of the country from which it derives its authority. The personal statute of one country controls the personal statute of another country into which a party once governed by the former, or who may contract under it, should remove. But it is subject to a real statute of the place where the person subject to the personal should fix himself, or where the property on which the contest arises may be situated. So far the rules are plain and intelligible, but the moment we attempt to discover from these writers what statutes are real and what are personal the most extraordinary confusion is presented. Their definitions often differ, and when they agree on their definitions they dispute as to their application.

Bartolus, who was one of the first by whom this subject was examined, and the most distinguished jurist of his day, established as a rule that whenever the statute commenced by treating of persons, it was a personal one; but if it began by disposing of things, it was real. So that if a law, as the counsel for the appellants has stated, was written thus: "The estate of the deceased shall be inherited by the eldest son," the statute was real; but if it said, "the eldest son shall inherit the estate," it was personal.

The distinction, though purely verbal and most unsatisfactory, was followed for a long time, and sanctioned by many whose names are illustrious in the annals of jurisprudence, but it was ultimately discarded by all. D'Argentre, who rejected this rule to real and personal statutes, added a third which he called mixed. The real statute, according to this writer, is that which treats of immovables. *In quo de rebus soli, id est immobilibus agitur*, and the personal that which concerns the person abstracted from things. *Statutum personale est illud quod afficit personam universaliter, abstracte ab omni materia reali*. The mixed he states to be one which concerns both persons and things.

The definition of D'Argentre of a personal statute has been adopted by every writer who has treated of this matter. A long list of them, amounting to twenty-five, is given by Froland in his *Memoires concernant la Qualite des Statuts*, among which are found Burgundus, Rodenburgh, Stockmans, Voet and Dumoulin: Froland, *Memoires concernant la Qualite des Statuts*, chap. 5, No. 1. But the definition which he has given of a real stat-

ute, does not seem to have been so generally adopted; it was, however, followed by Burgundus, Rodenburgh and Stockmans.

Boullenois, who is one of the latest writers, attacks the definitions given by D'Argentre, and, as he supposes, refutes them; he adds others which appear to be as little satisfactory as those he rejects. He divides personal statutes into personal particular and personal universal; personal particular he sub-divides again into pure personal and personal real: Boullenois, *Traite de la personalite et de la realite des lois*, tit. 1, cap. 2, obs. 4.

Voet has two definitions: one that a real statute is that which affects principally things, though it also relates to persons; and the other, that a personal statute is that which affects principally persons, although it treats also of things.

It would be a painful and a useless task to follow these authors through all their refinements. President Bouhier, who wrote about the same time as Boullenois, and who has treated the subject as extensively as any other writer, after quoting the definitions just given, and others, says, that they are all defective, and that he can not venture on any until the world are more agreed what statutes are real and what are personal. While they remain so uncertain, he thinks the best way is to follow the second definition of Voet, which is: "That a real statute is that which does not extend beyond the territory within which it is passed, and a personal is that which does:" *Bouhier sur les Coutumes de Bourgogne*, chap. 23, No. 59. This last mode of distinguishing statutes, which teaches us what effect a statute should have, by directing us to inquire what effect it has, is quite as unsatisfactory as the rule given by Bartolus, who judged of it by the words with which it commenced.

The rules given by Chancellor D'Aguesseau, are perhaps preferable to any other. That, says he, "which truly characterizes a real statute, and essentially distinguishes it from a personal one, is not that it should be relative to certain personal circumstances, or certain personal events; otherwise we should be obliged to say that the statutes which relate to the paternal power, the right of wardship, the tenancy by curtesy (*droit de viduite*), the prohibition of married persons to confer advantages on each other, are personal statutes, and yet it is clear, in our jurisprudence, that they are considered as real statutes, the execution of which is regulated not by the place of domicile, but by that where the property is situated."

"The true principle in this matter is, to examine if the statute has property directly for its object, or its destination to certain

persons, or its preservation in families, so that it is not the interest of the person whose rights or acts are examined, but the interest of others, to whom it is intended to assure the property, or the real rights which were the cause of the law. Or if, on the contrary, all the attention of the law is directed towards the person to provide in general for his qualifications or his general and absolute capacity; as when it relates to the qualities of major or minor, of father or of son, legitimate or illegitimate ability or inability to contract by reason of personal causes."

In the first hypothesis the statute is real, in the second it is personal, as is well explained in these words of D'Argentre: "*Cum statutum non simpliciter inhabilitat, sed ratione fundi aut juris realis alterum respicientis extra personas contrahentes, totas hanc inhabilitatem non egredi locum statuti.*" Œuvres D'Aguesseau, vol. 4, 669, cinquante-quatrième plaidoyer.

This definition is, we think, better than any of the rest; though even in the application of it to some cases, difficulty would exist. If the subject had been susceptible of clear and positive rules, we may safely believe this illustrious man would not have left it in doubt, for if anything be more remarkable in him than his genius and his knowledge, it is the extraordinary fullness and clearness with which he expresses himself on all questions of jurisprudence. When he, therefore, and so many other men of great talents and learning, are thus found to fail in fixing certain principles, we are forced to conclude that they have failed, not from want of ability, but because the matter was not susceptible of being settled on certain principles. They have attempted to go too far; to define and fix that which can not in the nature of things be defined and fixed. They seem to have forgotten that they wrote on a question which touched the comity of nations, and that that comity is, and ever must be, uncertain. That it must necessarily depend on a variety of circumstances which can not be reduced within any certain rule. That no nation will suffer the laws of another to interfere with her own, to the injury of her citizens; that whether they do or not, must depend on the condition of the country in which the foreign law is sought to be enforced; the particular nature of her legislation, her policy, and the character of her institutions. That in the conflict of laws, it must be often a matter of doubt which should prevail; and that whenever that doubt does exist, the court which decides will prefer the law of its own country to that of the stranger.

These principles may be in part illustrated by one or two

examples that we presume will receive general assent. The writers on this subject, with scarcely any exception, agree that the laws or statutes which regulate minority and majority, and those which fix the state and condition of man are personal statutes, and follow and govern him in every country. Now, supposing the case of our law fixing the age of majority at twenty-five, and the country in which a man was born and lived previous to his coming here placing it at twenty-one, no objection could be perhaps made to the rule just stated, and it may be, and we believe, would be true, that a contract made here at any time between the two periods already mentioned would bind him.

But reverse the facts of this case, and suppose, as is the truth, that our law placed the age of majority at twenty-one; that twenty-five was the period which a man ceased to be a minor in the country where he resided; and that at the age of twenty-four he came into this state, and entered into contracts, would it be permitted that he should in our courts, and to the demand of one of our citizens, plead as a protection against his engagements the laws of a foreign country, of which the people of Louisiana had no knowledge; and would we tell them that ignorance of foreign laws, in relation to a contract made here, was to prevent them enforcing it, though the agreement was binding by those of our own state? Most assuredly we would not: *Baldwin v. Gray*, 4 Mart. N. S. 192 [*ante*, 169].

Take another case. By the laws of this country, slavery is permitted, and the rights of the master can be enforced. Suppose the individual subject to it is carried to England or Massachusetts, would their courts sustain the argument that his state or condition was fixed by the laws of his domicile of origin? We know they would not. These examples might be multiplied, but they are sufficient to explain the ideas of this court, that it is almost impossible to lay down any general rule on the subject, and that even the personal statutes of one country may be controlled by those of another. From the various definitions already cited, it may be easily supposed that a vast diversity of opinion existed in their application to the contract of marriage. Both in France and Holland it has been a subject of great contention; the courts and parliaments of different provinces deciding it differently, some of them considering the law which regulates the rights of parties in the country where the marriage takes place as real, some as personal.

An examination of the different treatises on this subject has

convinced us that the greater number of the lawyers of those countries are of opinion that in settling the rights of husband and wife, on the dissolution of the marriage, to the property acquired, the law of the place where it was contracted, and not that where it was dissolved, must be the guide. Such was the jurisprudence of the parliament of Paris. It was the opinion of Dumoulin, of Boullenois, of Rodenburgh, of Le Brun, of Froland, of Bouhier, of Stockmans, of Pothier, and it is that of Merlin. On the other side are found, D'Argentre, Cravette, Everard, Vandermeulen, the parliament of Rouen, the supreme court of Brabant, and that of Metz.

But it is evident the opinions of the greater number of those who think that on the dissolution of the marriage, the law of the place where it was contracted should regulate the rights of the spouses to the property possessed by them, is founded on an idea which first originated with Dumoulin, that where the parties marry without an express contract, they must be presumed to contract in relation to the law of the country where the marriage took place, and that this tacit contract follows them wherever they go.

It is particularly worthy of remark, that Dumoulin, the founder of this system, was of opinion that the statute regulating the community was real, and that it was to escape from the consequences of this opinion he supposed a tacit contract, which, like an express one, followed the parties wherever they went. Such, at least, was the opinion which Boullenois entertained of Dumoulin's sentiments; and it appears supported by quotations which he makes from his works: Boullenois, *Traite de la personnalite et de la realite des lois*, Obs. 29, p. 740, 757, 758.

Some of those who have adopted the conclusions of Dumoulin in regard to the marriage contract, treat the idea of a tacit agreement as one which exists in the imagination alone! But the greater number seem to have embraced it; and we are satisfied it is the main ground on which the doctrine now rests in France. So far, therefore, as great names can give weight to any opinion, it comes to us in a most imposing shape, but to our judgment it is quite unsatisfactory.

Admitting it for a moment to be true that when parties married there was a tacit contract between them, their rights to property subsequently acquired should be governed by the laws of the country where the marriage took place; that tacit agreement would still be controlled by the positive laws of any country into which they might remove. This is admitted by

Dumoulin himself, who, after treating of the tacit agreement, and stating that the statute is not legal but conventional, *statutarium proprie non esse nec legale, sed conventitium*, adds, such tacit convention can not have this effect in another place where there exists a contrary statute which is absolute and prohibitive, *alias si statutum esset absolutum et prohibitorium, non obstantibus pactis factis in contrarium: tunc non haberet locum ultra fines sui territorii*: Dumoulin on the first book of the Code *verbo conc. de stat. et consuet. loc.*; Froland, *Memoires sur les Statuts*, chap. 4, 63.

If such be the consequence where the statute is prohibitive, we do not see why the same result should not follow from a real statute which regulates things within the limits of the country where it is in force. The reason for both is the same, namely, that the laws of the country where the contract is sought to be enforced are opposed to it. Why the one should have effect, and the other should not, we profess to be unable to distinguish. It may be a question whether the statute is real or not, but the moment it is admitted to be so, it regulates all property acquired within its authority; then, according to the principles of Dumoulin, the tacit agreement can no more control it than it could the law which positively forbade such tacit agreement from having effect. So that even admitting this tacit agreement, we are brought back to the point from which we started, that is, whether the law regulating the right of husband and wife be real or personal.

But without agreeing with those who have treated the idea of Dumoulin as one purely of the imagination, we think that he gives to this tacit consent a much more extended effect than it is entitled to. That in supposing when parties marry they intend the laws of the place where the contract is made should govern them wherever they go, he begs the question; and that the first thing to be settled is whether these laws do govern them wherever they go.

We are now treating, let it be remembered, of a case such as that before us, where there is no express contract, and the argument is, that the parties not having entered into an express agreement, the presumption must be they intended their rights to property should be governed by the laws of the country where they married. This is admitted, but then this presumption, as to their agreement, can not be extended so as to give a greater effect to those laws than they really had. If it be true those laws had no effect beyond the limits of the state where they were

passed, then it can not be true to suppose the parties intended they should have effect beyond them. The extent of the tacit agreement depends on the extent of the law. If it had no force beyond the jurisdiction of the power by which it was enacted, if it was real and not personal, the tacit consent of the parties can not turn it into a personal statute. They have not said so, and they are presumed to have contracted in relation to the law, such as it was, to have known its limitation, as well as its nature, and to have had the one as much in view as the other. If the law of Virginia should have been, that for twenty years the acquisitions made by the parties belonged to one of them, and they married without an express stipulation to the contrary, they would be presumed to have contracted in reference to this limitation of time. If, on the contrary, the law is limited as to place, the tacit agreement which is founded on a supposed consent that the law should govern them, must be considered to have that limitation in view. In one word, the parties are presumed to have agreed that the law should bind them as far as that law extended, but no further. So that this doctrine brings us back again to the inquiry, was the statute real or personal? Did it extend beyond the limits of the country where the marriage took place, or did it not? Whichever it may be found to be, the parties must be supposed to have contracted. In the absence of anything expressed to the contrary, we can not presume they intended to enlarge or restrain the operation of the law.

The most familiar way of treating this idea of tacit contracts being made in relation to the laws of the country where they are entered into, is to say that the agreement is to be construed in the same way as if those laws were inserted in the contract. Now, supposing the parties to marry in Louisiana, and that our statute, providing for the community of acquets and gains, is real and not personal; that it divides the property acquired while in this state equally between the husband and wife, but does not regulate that which they gain in another country to which they remove; the insertion of this law in a contract would be nothing more than a declaration, that while residing within this state there should be a community of acquets and gains. An agreement such as this could not have the same force as an express one, by which the parties declared there should be a community of acquets and gains wherever they went; for the one has no limitation as to place, and the other has. The maxim, therefore, which was so much pressed on us in argument, *taciti*

et expressi eadem vis, is only true where the law, to which the tacit agreement refers, contains the same provisions as the written contract.

It was evidently on this distinction the cases of *Murphy v. Murphy*, 5 Mart. 83 [12 Am. Dec. 475]; and *Gale v. Davis's Heirs*, 4 Mart. 645, were differently decided in this court. In the former there was an express contract that there should be a community of acquests and gains between the parties, even though they should reside in countries where different laws might prevail. In the latter there was no express agreement; and the parties were not presumed to have made a tacit one, contrary to the law of the place where they married. They were not supposed to have agreed that a real statute, which governed them only while there, was to follow them as a personal one, and regulate their property in another state. If principles so plain required any authority, we would find it in the very author on whom the appellants principally rely. Dumoulin, after stating that the tacit contract will be controlled by a law that is contrary to it in the country where the marriage is dissolved, adds, that it will be different where the agreement is expressed. *Nisi expresse de tali lucro conventium fuisset, quia pactio bene extenditur ubique, sed non statutum mere*: Froland, *Memoires sur les Statuts*, cap. 4, p. 63.

Having thus stated the reasons why this doctrine of a tacit contract can not be admitted by us to the extent pressed by the counsel, it only remains for us to examine whether the law of the Fuero was a real or a personal statute. We consider it real. It appears to us to relate to things more than to persons; to have, in the language of D'Aguesseau, the destination of property to certain persons and its preservation in families in view. It gives to the wife and her heirs the one half of that which would otherwise belong to the husband. Boullenois, who rejects Dumoulin's idea of a tacit agreement, says the statute which regulates the community is a personal one, because it fixes the state and condition of the spouses; and he goes so far as to declare that if his adversaries will not allow this doctrine to be correct, then the statute is real, for on no other ground can it be considered personal. We think the state and condition of both husband and wife are fixed by the marriage in relation to everything but property, independent of this law; and as it regulates property alone, it is not a personal statute: Boullenois, *Traite des Statuts*, cap. 5, obs. 29, p. 751; cap. 2, obs. 5, 80.

Upon reason, therefore, but still more clearly on authority, we think the appellants have failed to make out their case. We know of no question better settled in Spanish jurisprudence; and what is settled there can not be considered as unsettled here. The jurisprudence of Spain came to us with her laws. We have no more power to reject the one than the other. The people of Louisiana have the same right to have their cases decided by that jurisprudence as the subjects of Spain have, except so far as the genius of our government, or our positive legislation, has changed it. How the question would be decided in that country if an attempt were made there on the authority of French or Dutch courts and lawyers, to make them abandon a road in which they have been traveling for nearly three hundred years, we need not say. The question is sufficiently answered by the *auto* already cited; in which the adoption of the opinions of foreign jurists, in opposition to those of Spain, is reprobated and forbidden.

We conclude, therefore, that a community of acquests and gains did exist between the insolvent and the mother of the appellees from the time of their removal into this state; and that the court below committed no error in placing them on the *bilan* as privileged creditors for the amount of those acquests which remained in their father's possession at the dissolution of the marriage.

[The remainder of the opinion relates to the construction of certain provisions of the Louisiana code of a merely local character, and is therefore omitted.]

CONFLICT OF LAWS.—The doctrine established by this case, that when the *lex loci contractus* and the *lex fori* come in direct collision, the comity of nations must yield to the positive law of the land, seems to have been recognized at an early date, and at the present time to be well settled. In *Potter v. Brown*, 5 East, 124, Lord Ellenborough, in his opinion, says: "We always import, together with their persons, the existing relations of foreigners as between themselves according to the laws of their own countries; except, indeed, where those laws clash with the rights of our own subjects here, and one or the other of the laws must necessarily give way, in which case our own is entitled to the preference. This having been long settled in principle, and laid up among our acknowledged rules of jurisprudence, it is needless to discuss it further." And whenever there is any doubt as to what law should prevail, preference will always be given by the court rendering the decision to laws of its own sovereignty; and if particular contracts are prohibited from having effect according to the rules of the country where they are made, by the positive law of a state the latter must prevail: Story on Confl. of Laws, sec. 326; 2 Kent's Com. 461; 3 Burge Comm. on Col. and For. Law, 778, 779; see *Marsh v. Putnam*, 3 Gray, 567; *Ramsey v. Stevenson*, 12 Am. Dec. 468; note, 470.

THE PRINCIPAL CASE was referred to with great frequency by Judge Story in his Commentaries on the Conflict of Laws. Thus, he cites it in section 12 to show what the civilians of continental Europe understood by the term statutes; in sections 13, 14 and 51 to show what are deemed personal statutes; in section 28 to prove that whenever a doubt exists the court will prefer the laws of its own country to those of another; in section 33 to sustain the proposition that no nation has the right to require another to execute in the territories of the latter laws which are oppressive or injurious to the inhabitants thereof; in section 38 and 326 to show in what cases certain rules of Huberus have been approved; in section 75 to support the rule that the validity of contracts is to be determined by the laws of the country in which they were made; in sections 78, 89 and 306 to combat the doctrine that "personal incapacities communicated by the laws of any particular place accompany the person wherever he goes;" in section 96 to establish the rule that slaves in a foreign country would no longer be deemed such after their removal into this country; in sections 153, 157, 168, 170, 173, 174, 175, 176, 177, 178, 179 and 190 to illustrate and support various propositions arising out of the conflict of laws concerning the contract of marriage and the respective rights and obligations of the parties thereto; in section 277 to prove that no court will "assume the power to declare that a foreign court misunderstood the laws of their own country, or the operation of them on contracts made there;" and in section 431 to support the rule "that a person having capacity to transfer by the law of the *situs* may make a valid title, notwithstanding an incapacity may attach to him by the law of his domicile."

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

EMERY v. GOWEN.

[4 GREENLEAF, 83.]

DAMAGES FOR SEDUCTION.—The wounded honor of the family and the laceration of the parental feelings may be regarded in estimating damages. When the father of the seduced female is the plaintiff, no acts of service need be proved if she be a minor; but if she be of age, it must appear that she resided in her father's family, and some acts of service, however slight, must be proved.

SEDUCTION.—A father may sustain an action for the seduction of his minor daughter, though she reside, when debauched, out of his family, unless he has divested himself of his right to control her and to require her services.

SEDUCTION OF A FEMALE APPRENTICE, while she is a minor and after her master turns her away, or after, with the consent of the master, her return to reside with her father, gives the latter a cause of action against the seducer.

TRESPASS on the case for seducing the plaintiff's daughter. The facts proved at the trial were: The daughter was between twenty and twenty-one years of age at the time of her seduction. When she was fifteen or sixteen years old, her mother being dead, her father, with her consent, bound her as an apprentice to her uncle, until she should be twenty-one years of age. A few weeks afterwards, her uncle, being intoxicated and in a violent passion, beat her with great severity, and she left him, her uncle having refused to keep her, and her father having agreed to take care of her himself; and had since, with her father's permission, been in service in different families, her father not keeping house at the time. She was employed at her grandfather's for no fixed term at the time of her seduction.

Her father commenced keeping house again in 1824, during her pregnancy, when she returned to him. The indentures remained in the hands of the respective parties still uncanceled, but her uncle testified that he considered that he had broken them by the beating of the girl, and that he regarded them as of no force, and had not since that time claimed any control over her or right to her services. The judge ordered a nonsuit, to which the plaintiff took exceptions.

Appleton and Greenleaf, in support of the exceptions, contended: 1. That the daughter being a minor, her father was entitled to require her services at any time, and could therefore maintain this action, although she was absent from his house when she was seduced: *Peake's Cas.* 55, 233; *Reeve's Dom. Rel.* 292; 3 *Dane's Abr.* 504; *Martin v. Payne*, 9 *Johns.* 387 [6 *Am. Dec.* 288]; *Nickleson v. Stryker*, 10 *Id.* 115 [6 *Am. Dec.* 818]; 3 *Bl. Com.* 143, Christian's note; 5 *Bos. & P.* 476; 3 *Wils.* 18; 2. That the existence of the indentures was no obstacle to the action, because they had been canceled by consent of parties, or at any rate that the uncle had given the apprentice license to depart forever from his service, which if not irrevocable was at least good until revoked: *Lewis v. Wildman*, 1 *Day*, 153; *Reeve's Dom. Rel.* 344; 6 *Mod.* 69, 70; 3 *Vin. Ab.* 27, tit. Apprentice, H. pl. 14; 3 *Dane's Abr.* 595; 3. That the indentures were absolutely void as containing an unlawful condition, since a female could be lawfully bound only until the age of eighteen: *Day v. Everett*, 7 *Mass.* 145; and also because the indentures in this case were a restraint upon the female's common law right to contract marriage at the age of eighteen, 4 *Burr.* 2225, and were within the principle of other contracts against the policy of the law: 1 *Esp.* 136; 10 *Co.* 100, b.; 12 *Mod.* 683; *Mitchell v. Reynolds*, 10 *Id.* 134; *Colgate v. Bacheler*, *Cro. Eliz.* 872; and that the indentures being wholly void because they were contrary to an express statute, all the covenants to secure performance were also void: *Guppy v. Jennings*, 1 *Anst.* 256; though it might have been otherwise, if some of the covenants only had been void at common law: *Norton v. Simmes*, *Hob.* 12; *Lee v. Coleshill*, *Cro. Eliz.* 529; *Layng v. Paine*, *Willes*, 571; 5 *Vin. Abr.* 98, Condition, Y. pl. 7, 8; *Wheeler v. Russell*, 17 *Mass.* 258; 4. That, even if the father were not entitled to the daughter's services, the action might nevertheless be maintained, because the loss of service was a mere legal fiction, which should not be permitted to work in-

justice, the real gist of the action being the disgrace to the family and the injury to the parent's feelings.

J. Shepley and D. Goodenow, contra, insisted: 1. That loss of service was necessary to support the action: 1 Chit. Pl. 47; 2 Id. 267, note u.; 2 Phil. Ev. 157; 3 Selw. N. P. 967; *Irwin v. Dearman*, 11 East, 23; 3 Bl. Com. 142, note 14; *Dean v. Peel*, 5 East, 49; 2 Ld. Raym. 1032; 3 Burr. 1878; 2 T. R. 166; *Nickleson v. Stryker*, 10 Johns. 115 [6 Am. Dec. 318]; 2. That the indentures were a bar to the action since they gave the uncle, and not the father, the right to the daughter's services, and that they were not canceled by the uncle's cruelty, because the statute itself provided a remedy for that by action on the covenants: *Powers v. Ware*, 2 Pick. 451; 3. That if the indentures were not good under the statute, they were nevertheless valid at common law as an assignment of the daughter's services: *Day v. Everett*, 7 Mass. 145.

By Court, WESTON, J. The foundation of this action is the supposed loss of service to the father occasioned by the seduction. But in the estimation of damages, the wounded honor of his family and the laceration of his parental feelings are principally regarded. When the daughter is of age, it must appear that she resided in her father's family; and some acts of service, however slight, must be proved, in order to maintain the action. If the child be under twenty-one, no acts of service need be proved.

In the case of *Dean v. Peel*, 5 East, 45, the action was not maintained, the child, though a minor, not residing in her father's family; but the case appears to have turned rather upon the fact that she had no intention of returning, than upon the circumstances of her happening to reside elsewhere. Spencer, J., in delivering the opinion of the court, in *Martin v. Payne*, 9 John. 387 [6 Am. Dec. 288], says, that he considers this case of *Dean v. Peel* as the only one which has ever denied the right of the father to maintain an action for debauching his daughter while under age; and he deems it a departure from all former decisions on this subject. And he clearly held, upon a view of the authorities, that where the daughter is a minor, though she resides out of the family, if the father has not divested himself of the power to reclaim her services, she remains his servant *de jure*, though not *de facto*, and the action is maintainable. And we are satisfied upon examination, that the weight of authority is in favor of this position.

The decision of this cause will depend then upon the question, whether the father, at the time of the seduction, had so transferred his parental rights as to have no control over his daughter. If he had not, she being a minor, although not actually residing at the time in the family, the action is maintainable.

It is contended that in this case, the father having by indenture assigned the services of his daughter, with her consent, when she was fifteen or sixteen years of age, to her uncle, until she should be twenty-one, his control over her had ceased. We are very clear that this was not a binding out under the statute; it extending beyond the period of eighteen years; and that therefore neither of the parties could be entitled to the special remedies therein provided. If the father refused to suffer the child to serve, or the child had left his service without his permission and against his will, the uncle had no means of getting possession of the person of the child; but his only remedy would be a suit of law against the father, upon the contract.

The statute does not, however, make void indentures or assignments of the services of a child, not executed in the manner prescribed. They may be good at common law, during minority, and so they were held to be, by Parsons, C. J., in the case of *Day v. Everett*, 7 Mass. 145. If in pursuance of the indentures, although they did not conform to the statute, the daughter had gone into the service of the uncle, and had continued with him up to the period of the seduction; although the uncle, standing *in loco parentis*, might have maintained this action, the father could not. But it appears that the uncle, being conscious that he had treated his niece harshly and improperly, by acts of unjustifiable violence, and conceiving that the indentures were thereby broken, permitted her to leave him, after she had continued with him only six or eight weeks, and refused to receive her again; and that in point of fact she has never resided with him since. And although the uncle still retained the indentures in his possession, yet he told the father that he considered them at an end, and thereupon he consented to receive his daughter back again, and she has since been under his direction; working at different places by his consent, and being, by his permission, at her grandfather's at the time of the seduction.

But it is insisted that the indentures must be considered as still in force in contemplation of law, having been executed under seal; and that they could not, therefore, be legally discharged by parol. After what had taken place by mutual con-

sent between the parties, it might be difficult for either party to maintain an action upon the covenants; and if in strict law, and upon technical principles, it could be done, nothing more than nominal damages could be recovered. If the parties regarded the contract as at an end, and waived all remedies under it, we are not aware upon what ground third persons can insist upon its existence. The father had the control of his daughter in fact; and no person certainly, except the uncle, could question his right thereto, which he is so far from doing, that he expressly declined receiving her, and had given up for many years all interference with her. But suppose the indentures still in force, and that the father not only had a right to insist, but did insist, upon the performance of the covenants contained in the indentures on the part of the uncle; he could only recover damages for the breach of them, having no legal means of enforcing specific performance. In the meantime, the uncle refusing to receive and protect his niece, and to fulfill towards her the parental duties, she is not to remain a vagabond in the street, and the father turned over to his contract; but the parental duties again necessarily devolve upon him, and, as incident thereto, and to enable him to discharge them, he is again reinstated in his parental rights. In every view which we can take of this case it appears to us that, at the time of the seduction, the plaintiff did control, and had a right to control, the person of his daughter, and that he may, therefore, legally maintain this action. The exceptions are accordingly sustained; the nonsuit is set aside, and the action is to stand for trial, at the bar of this court.

SEDUCTION OF DAUGHTER—LOSS OF SERVICES.—As to when and how far it is necessary, in an action by a father for the seduction of a daughter, to show that the daughter was in the father's service, see *Wallace v. Clark*, 5 Am. Dec. 654; *Martin v. Payne*, 6 Id. 288; *Nickleon v. Stryker*, Id. 318; *Hornketh v. Barr*, 11 Id. 568.

ANDERSON v. ANDERSON.

[4 GREENLEAF, 100.]

THE RECORD OF THE CONVICTION upon an indictment for adultery is evidence, in a subsequent suit for divorce brought against the defendant by his wife, both of the marriage and of the adultery.

AMENDMENT—A LIBEL FOR A DIVORCE, on the ground of adultery, may be amended by adding a charge of extreme cruelty.

LIBEL for a divorce *a vinculo matrimonii* on the ground of adultery of the husband.

Alden, for the libellant, offered in evidence a copy of the record of the husband's conviction of the offense charged.

Daveis, for the respondent, objected that there must be proof of the marriage independent of the recital in the indictment and verdict.

The COURT overruled the objection, deeming the record of the conviction sufficient proof of that fact.

Daveis, for the respondent, proved that the libellant had forgiven the offense by subsequent cohabitation with the respondent, with knowledge thereof.

Alden, for the libellant, then moved for leave to amend the libel by adding a charge of extreme cruelty, and praying a divorce, *a mensa et thoro*, for that cause.

The COURT granted the motion and ordered the amended libel to be served on the adverse party three months before the next term.

CONVICTION ON CRIMINAL PROSECUTION AS EVIDENCE IN CIVIL ACTION.—The doctrine of the principal case was reaffirmed in *Randall v. Randall*, 4 Greenl. 326, where a libel by a husband against his wife for a divorce on the ground of adultery was treated as sufficiently proved, when it was shown to the court that “she had been convicted of lascivious cohabitation with another man, who also was convicted and sentenced for adultery with her.” Notwithstanding these cases, it is quite doubtful whether a verdict and judgment in a criminal case can properly be received in evidence in a civil action “to establish the facts on which it was rendered:” Greenl. Ev., sec. 537; Freeman on Judgments, sec. 319.

WAITE v. MERRILL.

[4 GREENLEAF, 102.]

IMPLIED CONTRACTS.—When an express contract is in force the law does not recognize an implied one; and when services are performed under an express contract the action to recover for such services must be under the express contract, and that only, unless in consequence of the fault or consent of the defendant.

A MEMBER OF THE SOCIETY OF SHAKERS is bound by his covenant with the society whereby on becoming a member he stipulates never to make any claim for his services.

THE COVENANT EXACTED BY THE SOCIETY OF SHAKERS OF ITS MEMBERS is not void, and is not in violation of any constitutional right.

MONEY PAID ON AN ILLEGAL CONTRACT, voluntarily and knowingly, can not be recovered back.

ASSUMPSIT against the defendants as trustees and deacons of

the society of Shakers, in the town of New Gloucester, for services rendered by the plaintiff to said society, while a professed member thereof, for twelve years, from the time of his attaining the age of twenty-one.

It appeared at the trial that when the plaintiff was about fourteen years old his father carried him into the society of Shakers and apprenticed him to the deacons; that he remained with them, with the exception of a few months, until he attained the age of twenty-one, when he signed their covenant and became a member of the society; and that he so continued, contributing all his services and earnings to the community fund of the society, and receiving his support out of it until he was thirty-two years of age, when he left them.

The defendants relied upon the fact that the articles of covenant signed by the plaintiff and all other members of the society provided that no member of the society should ever have any demand against it for the value of his services. To prove which they offered the said articles in evidence. The preamble of the said articles provided that there should be "one joint union and interest in all things both spiritual and temporal, for the mutual good, support and comfort" of the members, "and for other pious and charitable uses, according to the covenant and order of the church," and that all the property of the society should be held in trust and administered by the deacons chosen by the society in perpetual succession. The substance of the several articles of covenant was as follows: 1. That all who were of age who offered themselves as members of the society, were to do so freely and voluntarily; 2. That no person under age was to be received as a member or as being under the immediate care and government of the society, except by the request or free consent of the parents or surviving parent of the child, or of those having the lawful and just care of it, and by the child's own desire; 3. That all persons of age who should be received as members and had any property, and were "free from debt or just demands of any that were without, etc., were allowed to bring in their substance, etc., and give it as a part of the joint interest of the church, agreeable to their own faith and desire, to be under the order and government of the deacons, etc., for the use and support of the church, and any other use that the gospel requires, according to the understanding and direction of those members with whom it was intrusted," etc.; 4. That all the members "should profess one joint interest as a religious right; that is, all were to have a just and equal right and privi-

lege, according to their needs, in the use of all things in the church, without any difference being made" on account of what any of them brought in, so long as they remained members, and were likewise "equally holden, according to their ability to maintain and support one joint interest in union and conformity to the order and government of the church;" 5. That it was not the purpose of the church to gather and lay up an interest of this world's goods," but to devote what was acquired by honest industry, beyond what was necessary for their own support, "to charitable uses, to the relief of the poor, and other such uses as the gospel might require," and therefore that it was their faith "never to bring debt nor demand against the church, or each other, for any interest or services" bestowed for the joint interest of the church, but freely to give their "time and talents, as brethren and sisters, for the mutual good one of another, and other charitable uses, according to the order of the church." The articles further provided "for the selection of certain persons as deacons, who were intrusted with the entire care and oversight of the temporal interests of the church, with full power to manage, protect and defend the same in behalf of the church," while acting in union according to the covenant, and no longer, and directed how their successors should be chosen. The concluding portion of the articles was as follows: "We do by these presents solemnly covenant with each other, for ourselves, our heirs and assigns, never hereafter to bring debt or demand against the said deacons nor their successors, nor against any member of the church or community, jointly or severally, on account of any of our services, or property thus devoted and consecrated to the aforesaid sacred and charitable use. And we also covenant with each other to subject ourselves in union as brethren and sisters, who are called to follow Christ in regeneration, in obedience to the order, rules and government of the church. And this covenant shall be a sufficient witness for us before all men, and in all cases relating to the possession, order and use of the joint interest of the church. In testimony whereof we have, both brethren and sisters, set our hands and seals," etc.

To prove that the plaintiff signed this covenant, the defendants offered one of the elders and several of the members of the society as witnesses, to whom the plaintiff objected on the ground of interest. Mutual releases were thereupon produced, by which the defendants released the witnesses from all claims and demands to contribute or assist in defend-

ing the suit, and all other demands by reason of the same; and the witnesses released to the defendants all interest in the common property in their hands as deacons, and in all other property belonging to the society. The plaintiff still insisted on his objection, but the court admitted the witnesses to testify, leaving their credibility to the jury. Much testimony was introduced on both sides concerning the faith, usages and practice of the society, which is not necessary to be stated in detail, as the purport of it is given in the opinion. The judge instructed the jury that the witnesses who testified for the defendants were competent, but that the jury should judge of their credibility; for, notwithstanding the releases, said witnesses still regarded themselves, and were regarded by the society, as Shakers; that it appeared from the testimony that the plaintiff was a man of common abilities and competent understanding when he signed the covenant, if he did sign it, and must be presumed to have understood it, and that there was nothing to show compulsion or undue influence; that there was nothing illegal or morally wrong in the covenant to render it void; and that however inconsistent with the views of the jury the faith of the Shakers might be, yet if they believed that the plaintiff knowingly signed the covenant, their verdict should be for the defendants. Verdict for the defendants. The plaintiff excepted to the opinion and directions of the judge.

Fessenden and Deblois, for the exceptions, claimed: 1. That the contract was unconstitutional and illegal, being in derogation of the right to possess and hold property, and an infringement of the duty of parents and children to support each other, and that being thus illegal in part, the whole contract was void: 1 Dane's Abr. c. 1, art. 25, secs. 1 and 3; *Stackpole v. Earl*, 2 Wils. 133; *Featherston v. Hutchinson*, Cro. Eliz. 199; 1 Com. Con. 30; 8 Mass. 46; 2. That the contract was void as being against good morals and public policy, it appearing from the evidence that the members were bound to submit to the orders, rules, and discipline of the church, and that the teachings and practice of the church were opposed to the marriage relation, and utterly subversive of all family ties, affections, and obligations: *Worcester v. Eaton*, 11 Mass. 368; *Smith v. Poor*, Id. 549; *Brown v. Getchell*, Id. 11; *Coolidge v. Blake*, 15 Id. 429; *Page v. Trufant*, 2 Id. 159 [3 Am. Dec. 41]; *Jones v. Randall*, Cowp. 39; 3. That the tendency of such a contract to enslave the minds and persons of the members of the society was contrary to the genius and policy of a free gov-

ernment; 4. That the witnesses for the defendants were not rendered competent by the mutual releases exhibited, since they still remained members of the society, and were entitled to support from the common fund, and bound to labor for the common benefit; 5. That the covenant, if valid, was entirely mischievous in its tendency, since if persons could thus unite their property in a common trust fund, reserving simply a right to be supported out of it, their interest therein being merely a right to personal sustenance, was not attachable, and they could thus live in luxury, and bid defiance to subsequent creditors; and that as a party could be relieved against such a contract in a court of equity, it ought not to be enforced at law: *Boynston v. Hubbard*, 7 Mass. 112; *Greenwood v. Curtis*, 4 Id. 93.

Orr and Greenleaf, contra, denied that there was anything in the contract inconsistent with law or with good morals, and contended that even if part of the covenant were void at common law as against public policy, the rest was good: 5 Vin. Abr. 98, pl. 7; and that if the contract were wholly void as contrary to the policy of the law, the plaintiff was a willing party to the wrong, and could not recover wages for services rendered under such contract: *Bland v. Robinson*, Doug. 679. They also cited *Anderson v. Brock*, 3 Greenl. 243, as being conclusive upon the point that the defendants' witnesses were competent.

By Court, MELLAN, C. J. This case presents two questions for consideration: 1. Were certain members of the society of Shakers properly admitted as witnesses? and, 2. Were the instructions of the judge to the jury correct?

1. The objection to the admission of the witnesses seems to have been effectually removed by the releases given at the trial. A question of the same nature was settled by this court in the case of *Anderson v. Brock*, 3 Greenl. 243. The only difference is, in that case the witnesses were introduced by the plaintiffs; and they and the witnesses executed mutual releases. This objection, therefore, is overruled.

2. The second deserves more consideration. Under the instructions which the jury received, they have found that the plaintiff knowingly signed the covenant; and by the report it appears that he was a man of common natural abilities and understanding; and sometimes taught and exhorted in the religious meetings of the society; and that he was more than twenty-one years of age when he signed it. By thus signing he assented to all the terms and conditions specified in that cov-

enant; made its stipulations his own, and agreed to conform to the rules and regulations of the society in relation to its spiritual and temporal concerns. By the covenant, and also from the testimony of the plaintiff's own witnesses, it appears that a community of interest is an established and distinguishing principle of the association; that the services of each are contributed for the benefit of all; and all are bound to maintain each in health, sickness and old age, from the common or joint fund created and preserved by joint industry and exertion. And each one, by the express terms of the covenant, engages "never to bring debt or demand against the said deacons, nor their successors, nor against any members of the church or community, jointly or severally, on account of any service or property thus devoted and consecrated to the aforesaid sacred and charitable use." Such are the facts as to the contract into which the plaintiff entered when he subscribed the covenant. It is an express contract.

The plaintiff in the present action, however, does not profess to found his claim on an express promise; but he contends that upon the facts proved and disclosed in the report before us, the law implies a promise on the part of the defendants to pay him for his services, although they were performed for the society of which the defendants are officers, and not for them in their private capacity, and although such an implied promise is directly repugnant to the covenant or written contract. Besides, it is clear from all the evidence in the cause, that whatever services the plaintiff performed while he was a member of the society and remained and labored with them, he performed in consequence of his membership and in pursuance of the covenant, in virtue of which he became a member. Now it is a principle perfectly well settled, that where there is an express contract in force the law does not recognize an implied one; and where services have been performed under an express contract the action to recover compensation for such services must be founded on that contract and on that only, unless in consequence of the fault or consent of the defendant. In the present case there is no proof that the covenant has been violated on the part of the society, or that the plaintiff had any right to waive that covenant and its special provisions and resort to a supposed implied promise on which to maintain his action. But as the covenant refers to the order of the church and their peculiarities of faith, and as at the trial both parties, without objection, went into an examination of witnesses and thus ob-

tained all those facts in relation to the society which are detailed in the judge's report, the argument of the counsel has been founded on all the evidence in the cause viewed in a body; and, of course, in forming our opinion we shall place it on the same broad foundation, without reference to technical objections, if any should present themselves. We are perfectly satisfied that the covenant was properly admitted as proof to the jury, to show on what terms and considerations the services were performed by the plaintiff for which he is now seeking compensation. We are also of opinion that the instructions of the judge to the jury were correct, if the covenant signed by the plaintiff, taken in connection with those facts in the cause which are considered on this occasion as a part of it, is a lawful covenant—one which the law will sanction as not being inconsistent with constitutional rights, moral precepts, or public policy. This leads us to the examination of the covenant, the principles it contains and enforces, and the duties it requires of the members of the society. The counsel for the plaintiff contends that the covenant is for several reasons void, and ought to be pronounced by this court to be a nullity.

It is said that it is void, because it deprived the plaintiff of the constitutional power of acquiring, possessing and protecting property. The answer to this objection is, that the covenant only changed the mode in which he chose to exercise and enjoy this right or power; he preferred that the avails of his industry should be placed in the common fund or bank of the society, and to derive his maintenance from the daily dividends which he was sure to receive. If this is a valid objection, it certainly furnishes a new argument against banks, and is applicable also to partnerships of one description as well as another.

It is said that the covenant or contract is contrary to the genius and principles of a free government, and therefore void. To this it may be replied that one of the blessings of a free government is, that under its mild influences the citizens are at liberty to pursue that mode of life and species of employment best suited to their inclinations and habits, "unembarrassed by too much regulation;" and while thus peaceably occupied, and without interfering with the rights and enjoyments of others, they freely are entitled to the protection of so good a government as ours; though perhaps all these privileges and enjoyments might be contrary to the genius and principles of an arbitrary government. But, in support of this objection, it is contended that the covenant is a contract for perpetual service

and surrender of liberty. Without pausing to inquire whether a man may not legally contract with another to serve him for ten years as well as one, receiving an acceptable compensation for his services, we would observe that by the very terms of the fourth and fifth articles, a secession of members from the society is contemplated and its consequences guarded against in the fifth by covenants never to make any claim for their services against the society; and the fourth article speaks of a compliance with certain rules so long as they "remained in obedience to the order and government of the church, and holden in relation as members." Besides, the general understanding and usage for persons to leave the society whenever they are inclined so to do, the plaintiff himself has in this case given us proof of this right by withdrawing from their fellowship; and now, in the character of a stranger to their rules and regulations, demanding damages in consequence of the dissolution of his contract. We therefore can not consider the contract of a subscribing member as perpetual; he may dissolve his connection when he pleases, though perhaps he may thereby surrender some of his property, as the consideration of his dissolution of the contract. In all this we see nothing like servitude, and the sacrifice of liberty at the shrine of superstition or monastic despotism.

It is said the covenant is void because it is in derogation of the inalienable right of liberty of conscience. To this objection the reply is obvious; the very formation and subscription of this covenant is an exercise of the inalienable right of liberty of conscience. And it is not easy to discern why the society in question may not frame their creed and covenant as well as other societies of Christians; and worship God according to the dictates of their consciences. We must remember that in this land of liberty, civil and religious, conscience is subject to no human law; its rights are not to be invaded or even questioned, so long as its dictates are obeyed, consistently with the harmony, good order and peace of the community. With us modes of faith and worship must always be numerous and variant; and it is not the province of either branch of the government to control or restrain them, when they appear sincere and harmless.

Again it is urged that the covenant is void because its consideration is illegal, that it is against good morals and the policy of the law. We apprehend that these objections can not have any foundation in the covenant itself; for that is silent as to many particulars and peculiarities which the counsel for the

plaintiff deems objectionable. The covenant only settles certain principles as to the admission of members; community of interest; mode of management and support; acquisition and use of the property; stipulations in respect to services and claims; professions of a general nature as to the faith of the society, and a solemn renewal of a former covenant and appointment of certain officers. This is the essence of the covenant signed by the plaintiff; and on this the defendants rely, as a written contract of the plaintiff; under his hand and seal, never to make the present claim; and also as a complete bar to it. Now, what is there illegal in its consideration, or wherein is it against good morals or the policy of the law? It does not contain a fact or a principle which an honest man ought to condemn; but it does contain some provisions which all men ought to approve; it distinctly inculcates the duty of honest industry, contentment with competency, and charity to the poor and suffering. In this view of the subject, these objections vanish in a moment. But if we consider them as founded on the covenant, and all the evidence in the cause together, the result of the examination will not, in a legal point of view, be essentially varied.

It is certainly true that some articles of faith peculiar to the society, appear to the rest of the world as destitute of all scriptural foundation; and several of their consequent regulations unnatural, whimsical, and in their tendency, in some respects, calculated to weaken the force of what are termed imperfect obligations. Professing to exercise a perfect command over those passions, which others are disposed most cheerfully to obey, they, perhaps, in so doing may chill some of the kindest affections of the heart, gradually lessen its sensibility, and to a certain extent endanger if not seriously wound "the tender charities of father, son and brother." Perhaps celibacy, out of the pale of this church, has often the same tendency. It is true the mode of education and government may be too restrictive; and the means used to preserve perfect submission to authority may be deemed artful, severe and in some particulars highly reprehensible, especially in their pretended knowledge of the secrets of the heart. On the other hand it appears, as before stated, that benevolence and charity are virtues enjoined and practiced; and the plaintiff's witnesses, who had formerly belonged to the society for several years, testified that "all vice and immorality are disallowed in the society; and integrity, uprightness and purity of life are taught and enforced among them, and that the precepts of the gospel, as they understand

and interpret them, constitute, as they conceive, the foundations of their faith and the rules of their practice."

As for their faith, it would seem from the volume which they have published, that it extends to unusual lengths, and leads to what others, at once pronounce to be absurdities; but this is not within our control, it is rightfully their own. But it is contended that according to the faith and principles and usages of the society, which are considered as referred to in the covenant as a part of it, the covenant amounts to a contract never to marry, which public policy will not sanction. We have before observed it is not a perpetual one; of course, at most, it is a contract not to marry while they continue members of the society; but their faith does not require so much as this; their principles condemn marriage in certain cases only, that is, where it is contracted with carnal motives, and not purely with a view of complying with the original command "increase and multiply." It is true they do not believe that marriages are contracted, except in some solitary instances, without motives far less worthy and disinterested. As it regards those members of the society who are married; though they may live separate, without cherishing the gentle affections, still such conduct violates no human law, and however lightly they may esteem the blessings of matrimony, their opinions do not lessen the legal obligations created by marriage. Surely they may agree to live in different houses and without any communication with each other. Contracts of separation between husband and wife are not infrequent, neither are they illegal when made with third persons.

This objection cannot avail, nor that which refers to the relation between father and son. Their principles require the circle of benevolence and affection to be enlarged; but not that parental or filial tenderness should be destroyed or lessened. We must not overlook the distinction between duties of perfect and imperfect obligation; the neglect of the former is a violation of law, which will render the delinquent liable in a court of justice to damages, penalties or punishment; but the performance of the latter is never the subject of legal coercion. A man may be punished for defrauding his neighbor, but not for indulging feelings of unkindness towards him, or in the hour of sorrow, withholding from him the balm of sympathy, consolation and relief. Though we may disapprove of many of the sentiments of this society in respect to the subject of education and discipline, yet as they steadily inculcate purity of morals,

such a society has a perfect right to claim, receive and enjoy, the full blessings of legal protection.

But for the sake of the argument, let us suppose that the covenant or contract is illegal and void for the reasons which have been urged by the plaintiff's counsel; what then will be the legal consequence? Will the action then stand on any firmer ground? Though in the present case, the plaintiff does not demand of the defendants the repayment of a sum of money paid to them, on the ground that they have no legal right to retain it, yet his demand is, in principle, the same thing; it is a demand of compensation for services rendered, on the ground that as the contract was unlawful and void, the value of those services may be recovered; that is, if he had increased the funds of the society by a sum of money instead of his personal labors and services, the right to recover back the money, or recover the value of those services in money, must be settled by the same principles of law in both cases. Now, what are those principles? Before stating them, let it be again observed that the jury have found that the plaintiff knowingly signed this covenant, which we are now considering in the light of an illegal and void contract; and voluntarily joined this society, and remained for several years a member engaged with all the other members in all the transactions of it, and all of them in *pari delicto*, for if the covenant is illegal and void, it is because the society who formed and signed it, is an unlawful society, and united for purposes which the law condemns.

“If a wager be made on a boxing match, and on the event happening, the winner receives the money, it can not be recovered back by the loser; for where one knowingly pays money upon a contract executed, which is in itself immoral and illegal, and where the parties are equally criminal, the rule is in *pari delicto potior est conditio defendentis*.” 2 Comyn on Contr. 120; Bull. N. P. 132; Cowp. 792. To the same point also is the case of *Howson v. Hancock*, 8 T. R. 575. Lord Kenyon there says: “There is no case to be found where, when money has been actually paid by one of two parties to the other on an illegal contract, both being *participes criminis*, an action can be maintained to recover it back again. Here the money was not paid on an immoral, though on an illegal consideration, and though the law would not have enforced the payment of it, yet having paid it is not against conscience for the defendant to retain it.” Lawrence, J., adds: “In *Smith v. Bromly*, Lord Mansfield said that where both parties are equally criminal against

the general laws of public policy, the rule is *potior est conditio defendentis*:" See *Smith v. Bromly*, Doug. 696. So, also, in *Edgar v. Fowler*, 3 East, 222, it was determined that an underwriter could not maintain an action against brokers to recover premiums of re-assurances declared illegal by statute. Lord Ellenborough, C. J., says: "We will not assist an illegal transaction in any respect; we leave the matter as we find it."

So, an action will not lie to recover back money deposited for the purpose of being paid to one for his interest in soliciting a pardon for a person under sentence of death: 3 Esp. 253. No implied promise arises out of an illegal transaction: *Robertson v. Tyler*, 2 H. Bl. 379; see, also, *Aubert v. Maze*, 2 Bos. & P. 371; and Mr. Dane, in his Abr. vol. 1, 194, says: "And on the whole, the sound principle is, the law will not raise or imply any promise in aid of a transaction forbidden by the law of the land." With these authorities before us, it would seem impossible to sustain the present action, even allowing the covenant and the society, by whom and for whose use it was formed, to be of the reprehensible and illegal character which has been given them. On the whole, we are all of opinion that there is a total failure on the part of the plaintiff, and there must be judgment on the verdict.

MONEY PAID ON ILLEGAL CONTRACT.—That money knowingly paid on an illegal contract can not be recovered, see *Touro v. Cassin*, 9 Am. Dec. 680.

JORDAN v. JORDAN.

[4 GREENLEAF, 176.]

LIMITATIONS.—Ignorance of one's rights, when not owing to the fraud or default of the debtor, does not prevent the operation of the statute of limitations.

ACTION FOR USE AND OCCUPATION OF LAND FOUNDED ON MISTAKE.—Several heirs of a decedent having entered into an agreement with one another for a division of the estate, but referring to a plat to be thereafter made and a deed to be thereafter executed to consummate the partition, and having gone into possession and occupied in severalty for more than thirty years, when a will was discovered devising the whole lands to one of them, it was held that, as the possession of the others was founded in mistake, the law implied a promise on the part of each to pay a reasonable rent for the parcel so held by him.

ASSUMPSIT brought by Thomas Jordan against the administratrix of the estate of his brother, Timothy Jordan, deceased, for the use and occupation of a certain farm from 1783 to August, 1821. It appeared at the trial that the said farm was

devised to Thomas Jordan by his father, who died seised in 1783, but that the will was not discovered or its existence known to any of the testator's children until a short time prior to its being proved in the probate court in January, 1822, and that the defendant's intestate had occupied the premises as stated in the writ. It further appeared that in 1784 the plaintiff and his brothers and sisters entered into an agreement, under their hands and seals, reciting that they desired to divide their father's estate among them without any formal administration, and providing for such division. The material provisions of the agreement are stated in the opinion. The parties severally entered into the possession of the parts of the estate assigned to them under the agreement (the part assigned to Timothy being the premises in question), but it did not appear that the division lines contemplated by the agreement were ever established, or that there had ever been any appraisement of the parts assigned as provided therein, or any partition deeds executed. The substance of the judge's instructions is stated in the opinion. Verdict for the defendant, subject to the opinion of the court upon the correctness of the instructions.

Daveis, for the plaintiff.

N. Emery, for the defendant.

By Court, Mellen, C. J. This case is a peculiar one, and not similar to any of those which have been cited in the argument, various and multiplied as they are. The plaintiff and the deceased, and all their brothers and sisters, in everything relating to this cause, and the agreement signed and sealed by them, and in all the facts to which it relates, and from which it originated, appear to have acted under a mistake as to their rights, but with perfect fairness and good faith. Under the circumstances which this cause presents, what are the legal principles to be applied in its decision?

Nothing appears to prevent the operation of the statute of limitations, as to all that part of the account which was of more than six years standing at the time of the commencement of the suit; for whatever right of action the plaintiff had as to such part, it accrued more than six years before this action was commenced; although the plaintiff did not know it; and this ignorance on his part can not prevent the effect of the statute, unless in those cases where such ignorance is owing to the fraud or default of the debtor: *Bree v. Holbech*, Doug. 655; *Bishop v. Little*, 3 Greenl. 405. As to the residue of the ac-

count, other grounds must be examined. Numerous cases show that on a failure of consideration, the law implies a promise of payment or re-payment of a sum of money, as the case may be; and the question in the present case is, whether the law raised a promise, on the part of the intestate, to pay for the use and occupation of the plaintiff's land. If so, this action is maintainable on the same principle that a promise is implied by law to pay a sum of money, which by mistake was omitted on a settlement of accounts, although a receipt in full was given at the time of settlement. A variety of cases similar in principle might be cited, if necessary.

The judge instructed the jury that the agreement under the hands and seals of all the children of Thomas Jordan, the father, on which the defendant grounds his defense, amounted to a lease at will, at least to each of the children, from all the other children, of the part of the estate which each was to have and hold; and being an agreement under seal, and no rent being reserved, this express agreement excluded all implication. We have carefully examined the agreement and the instructions of the judge to the jury, and have felt no little embarrassment in arriving at a conclusion satisfactory to our own minds. The result, however, of our examination is, that the legal principles which govern our decision, are in unison with the evident equity and justice of the plaintiff's claim. If we considered the agreement as a lease at will, and that each of the children entered under it, we should not be disposed to question the correctness of the judge's conclusions as to the effect thereby produced in relation to this action. A careful examination of that instrument has satisfied us all that it was only an incipient measure, adopted by the children as to the division of their father's estate.

Several other measures were contemplated, divisional lines were to be established, proportions to be adjusted by appraisement of indifferent men; disputes, if any, to be settled by referees; and finally partition-deeds to be made. In fact, the agreement is no more nor less than a bond in the penal sum of one hundred pounds, to make and execute among themselves deeds of partition, according to the general grounds agreed upon, after all preliminary and incidental questions should have been settled, and the division completed. There is no proof that such deeds have ever been executed, and this agreement or bond is now in as full force and virtue as it ever was. In the preamble of the agreement, the parties say the estate shall be divided as "near as may be according to the following plan."

The contract with Timothy was on condition of his paying a certain sum to each of his sisters; there is no proof it was ever paid. The contract with Thomas speaks of the appraisement of his part of the swamp, "by indifferent men, according to the goodness of it." The contract with Mary, Elizabeth, Sarah, Abigail and Ann, provides that the part they were to have was "to be equally divided between them, according to quantity and quality, with their brother Thomas Jordan's lot." The contract with John Jordan and Elizabeth, his wife, is, that they shall have their part of said estate, adjoining his land to the northward of the marsh, "as shall appear hereafter on the plan." We have no proof of any such plan. John and Sarah Marr's part was to be designated "as shall hereafter appear on the plan." Mary, Abigail and Ann's parts were to be designated on the plan, "according to the goodness and quantity of the land, with their brother Thomas, and their two other sisters." It is agreed that the residue of the estate "shall be equally divided between the other children." The closing provision relates to the future disposition of the personal estate. It is true that it appears by the report that each of the children, soon after the execution of the agreement, entered into possession of that part of the estate which, by said agreement, he or she was to have and hold in fee; but, by the agreement itself, it does not appear that any particular part was to be holden in severalty and in fee, until the contemplated deeds of division should have been made. Neither is there any provision in the agreement, that either of the sons or daughters should enter into their respective parts, as therein described, before such partition-deeds should have been executed. Their entry and possession, therefore, for aught appearing to the contrary, might have been, and undoubtedly was, by a mutual understanding and parol consent; but, as all this was founded on mistake, the law raises a promise, on the part of the intestate, to pay the plaintiff for the use and occupation of that land, which, by the will, is now found to have been, at the time of the occupation, his property, though the intestate and all concerned supposed otherwise. This view of the cause avoids all technical objections and difficulties, removes out of the way what has been incorrectly supposed an express contract under seal, in virtue of which the land was occupied, and thus opens the door of inquiry, and leaves room for the law to do perfect justice, by raising an implied promise in favor of the plaintiff, on the part of the intestate.

We are, accordingly, all of opinion, that the verdict must be set aside and a new trial granted.

SMALL v. SMALL.

[4 GREENLEAF, 220.]

WILL, PUBLICATION OF.—If the due subscribing and attesting of a will be proved, it need not be shown that the testator made the usual declaration that it was his last will and testament.

WILL, UNDUE INFLUENCE.—The influence which a wife, by her virtues, gains over her husband's affection and conduct, whereby he is caused to make a will in her favor, is no ground for refusing to admit the will to probate.

JURISDICTION.—The construction of a will is purely a matter of common law jurisdiction; while the question whether it ought to be approved and allowed is one of purely probate jurisdiction.

APPEAL from a decree of the judge of probate refusing probate of the will of Henry Small. The facts, and the various questions arising thereon, are sufficiently stated in the opinion.

Emery, for the appellants.

Longfellow, for the appellee.

By Court, **MELLEN, C. J.** This is an appeal from a decree of the judge of probate in this county. A paper, purporting to be the last will and testament of Henry Small, was presented for probate. Upon examination of all the facts in relation to the same, the judge was of opinion that the testator, at the time of making the supposed will, was not of sound and disposing mind and memory; and he thereupon decreed against the probate and allowance of the same, as the last will and testament of said Henry Small. In the reasons of appeal the decree is alleged to be against law, because the testator, at the time of making the will, was more than twenty-one years old; was then of sound and disposing mind and memory; and that the instrument was duly executed, and was his last will and testament. It has not been denied that the testator was of competent age; and in the argument it has not been contended that he had not the possession of his reason, understanding and memory; but the point relied on is, that if the instrument was duly executed as to form, still that it was not intended to be, or executed as, the testator's last will; and even if it was, that it was made under the unlawful importunity and influence of his wife, who is the principal appellant in the case, and that on that ground it is void.

1. From the testimony of the subscribing witnesses there does not seem to be any doubt as to the execution of the will in point of form. One of the witnesses testifies to his making the

usual declarations, that the instrument was his last will and testament. The other two do not particularly recollect this; but the circumstance is not material, the due subscribing by the testator and witnesses being proved: See 4 Dane's Abr. 559-61, 568, 569, and cases there cited.

2. The next question is, whether the instrument so executed was intended to be, and operate as, his last will, or was only designed as an admonition to his daughter Mary, the appellee, and an experiment, by way of corrective to her conduct, of which he was habitually complaining, and was in fact a mere measure, to have its effect *in terrorem* on the mind of his daughter, but none upon his own property.

On this point the proof is not clear. If such was his object, it seems no measures were taken to apprise her of what he had done; and there is proof of Mary's declaration, that she did not know of the existence of the will till some time after the testator's death, and more than four years after the will was executed. One of the subscribing witnesses says that the testator stated, that "if his daughter found out that he had cut her off, she would do better." Another of the witnesses says that the testator, at the time the will was written, remarked, that if his daughter "reformed, he should do better by her." Both say that at that time he appeared much excited and angry. And yet during four years he does not appear to have changed his determination as to his daughter and the disposition of his estate, though his excitement and passions must have subsided. It further appears from the testimony of one of the witnesses, that the testator requested him to examine the will and give his opinion respecting it, and spoke of it as his settled will. Considering all these circumstances in connection with the other important fact, that the will does not appear to have been revoked or canceled, or in any manner altered, we cannot perceive any legal ground for concluding that the instrument in question, when it was executed, was not intended to be his last will and testament, and as such to be considered and respected. We must presume that in his view, at least, his daughter had not "reformed," and therefore he was never disposed "to do better by her."

3. The next inquiry is, whether the instrument in question is to be disallowed as the last will and testament of Henry Small on account of any unlawful importunity and influence of his wife, by reason of which his mind was embarrassed and so restrained in its operations that he was not master of his own

opinions in respect to the disposition of his estate. On this subject no precise and distinct line can be drawn, but the influence exerted must be an unlawful influence on account of the manner and motive of its exertion.

If the testator be compelled by violence, or urged by threatenings, to make his testament, the testament being made by just fear is ineffectual. Likewise if he be circumvented by fraud the testament loses its force; for albeit honest and modest intercession or request is not prohibited, yet these fraudulent and malicious means whereby men are secretly induced to make their testaments are no less detestable than open force: 1 Swinb. 22. So if by over importunement. As, if a man make his will in his sickness by the over-importuning of his wife, to the end he may be quiet, this shall be said to be a will made by constraint, and shall not be a good will: Style, 427. If a wife by her virtues has gained such an ascendancy over her husband, and so riveted his affections that her good pleasure is a law to him, such an influence can never be a reason for impeaching a will made in her favor, even to the exclusion of the residue of his family; nor would it be safe to set aside a will on the ground of influence, importunity, or undue advantage taken of the testator by his wife, though it should be proved she possessed a powerful influence over his mind and conduct in the general concerns of life, unless there should be proof that such influence was specially exerted to procure a will of such a kind as to be peculiarly acceptable to her, and to the prejudice and disappointment of others. The evidence on this point is, that prior to the testator's marriage with the appellant, he was remarkably fond of his daughter Mary; but that afterwards there was not only a coldness, but a great degree of alienation; his affections were withdrawn from her, and in several instances he treated her with extreme harshness and severity. It appears, also, that the mother-in-law said she could not live with her, and that she ought not to share in the estate equally with the rest, as she had been so troublesome. It is also in proof that the husband often said his wife was the best woman in the country, and that such an angel of a woman could not do wrong; but no witness has testified as to her having exerted any influence over her husband in the disposal of his estate, though she expressed her opinion to one of the witnesses, as before stated, that Mary ought not to have an equal share with the rest of the family. The father also complained that Mary had a very ugly temper.

Such is the essence of the testimony applicable to this head of the cause, and the inference is irresistible that the testator reposed the greatest confidence in his wife and entertained the highest opinion of her virtues; and there is strong ground for believing that his opinion and treatment of Mary, after his marriage with the appellant, were the consequences of her prejudices against Mary, and complaints and accusations to him respecting her conduct. Thus far she seems to have possessed, and successfully exerted, a general influence over her husband; and there is no proof in the cause that Mary did not give occasion for some of the complaints made by the testator and his wife against her, or that the wife was not deserving of the affections and confidence of her husband. But a will must not be set aside in consequence of such a general influence obtained in such a manner; for in so gaining it she could not be liable to censure. Have we then any evidence by which we can be justified in the conclusion that she abused the confidence of her husband, and exerted an unlawful influence over his mind and feelings and passions, upon the subject of his will, so as to induce him to give his estate to her and her children, to the almost total exclusion of his children by the former marriage from the benefits of that estate? We do not find any proof direct to this point, and we do not feel at liberty to decide this cause or any other on mere conjecture. The law requires proof of facts, especially when the object is to destroy and set aside an act, apparently deliberate, and executed with all usual and legal formalities. For the reasons above assigned we can not sustain either of the three objections which we have been considering. The remaining one is of a different character.

4. The fourth objection is founded on the nature of the devise to the wife, or rather of the condition on which the estate is devised to her, viz: "that she shall hold it during the time she continues the widow of the testator, sole and unmarried." This condition or restriction, it is said, is void, as against the policy of the law; and in support of the objection the counsel has cited the case of *Parsons v. Winslow*, 6 Mass. 169 [4 Am. Dec. 107]. Hence, it has been argued, the will ought not to be allowed. Without giving any opinion as to the effect of the above mentioned condition or restriction, either as it may regard the estate devised to the appellant, or the subsequent devise and legacies to the several children, we would answer the argument by merely observing, that so far as the construction of the will, or any particular clauses in it, may be a subject of judicial inquiry,

it is one of purely common law jurisdiction, and not a question examinable by us, sitting as the supreme court of probate. On the contrary, the question whether an instrument, purporting to be a last will and testament, ought to be approved and allowed as such, is one of purely probate jurisdiction, and so not examinable by us in virtue of our common law jurisdiction. This distinction is well settled and established by our statute and uniform practice, as well as by the following decisions: *Osgood v. Breed*, 12 Mass. 525; *Dublin v. Chadbourn*, 16 Id. 433; *Laughton v. Atkins*, 1 Pick. 535; and *Shumway v. Holbrook*, Id. 114 [11 Am. Dec. 153]. This objection must share the same fate, and fail as the preceding; and the consequence is that the decree appealed from must be reversed, and the will approved and allowed, and an exemplification of this decree be remitted to the probate court, that such proceedings may there be had, touching said will, and in conformity to said decree as the law requires.

Decree reversed, and the will approved and allowed.

WHAT INFLUENCE OR IMPORTUNITY INVALIDATES WILL.—The question as to when a will is to be pronounced invalid because of undue influence or excessive importunity exercised upon the testator, in the act of making it, is one of very great difficulty. Indeed, the cases are so varied in their circumstances, and each depends so much upon its own particular facts, that it is almost impossible to deduce any rule from them which will not be so general as to be of little practical utility. As Judge Redfield remarks, 1 Redf. on Wills, 526: "The cases which have been decided upon this point are almost infinite in number and variety." In this multitude of adjudications upon the subject it is not surprising that the boundaries which different courts have undertaken to mark out between cases in which the influence exercised upon a testator is to be pronounced undue, and those in which it is to be regarded as fair and legitimate, are often indistinct and sometimes confused. "It is impossible," says Earl, J., delivering the opinion of the court in *Rollwagen v. Rollwagen*, 63 N. Y. 504, "to define or describe with precision and exactness what is undue influence, what the quality and the extent of the power of one mind over another must be to make it 'undue' in the sense of the law when exerted in making a will. Like the question of insanity, it is to some degree open and vague and must be decided by the application of sound principles and good sense to the facts of each case: *Lynch v. Clements*, 24 N. J. Eq. 431."

HONEST INTERCESSION, ARGUMENT AND PERSUASION, addressed to the understanding, conscience or affections of the testator, not controlling his will against his judgment or inclinations, and not coupled with any fraud or imposition, will not amount to undue influence even though urged beyond the bounds of strict propriety: *Rogers v. Diamond*, 13 Ark. 474; *Dickie v. Carter*, 42 Ill. 376; *Yoe v. McCord*, 74 Id. 33; *Rutherford v. Morris*, 77 Id. 397; *Rabb v. Graham*, 43 Ind. 1; *Bundy v. McKnight*, 48 Id. 502; *Hoge's Estate*, 2 Brewst. (Pa.) 450; *Matter of Jackman's Will*, 26 Wis. 104; 1 Redf. on Wills, 520, and cases cited. Says Tilghman, C. J., in *Miller v. Miller*, 8 Am.

Dec. 651; S. C., 3 Serg. & R. 267; Redf. Am. Cas. on Wills, 410: "The procuring a will to be made, unless by foul means, is nothing against its validity. * * * A man has a right, by fair argument or persuasion, to induce another to make a will, and even to make it in his own favor." In the same case, Duncan, J., says: "Influence, persuasion may be fairly used. A will may be honestly procured. Many wills, indeed, would be destroyed if you inquire into the degrees of influence and persuasion. A will procured by circumvention will be set aside; but a will procured by honest means, by acts of kindness, attention, and by importunate persuasion which delicate minds would shrink from, would not be set aside on this ground alone." Much less will modest and seemly persuasion have the effect to invalidate a testamentary disposition: *Lucas v. Cannon*, 13 Bush, 650. One has a lawful right to move another by fair means to make him his executor, or to give him his goods: *Walker v. Hunter*, 7 Ga. 364.

A very satisfactory statement of the true limits of legitimate persuasion in such cases is found in the learned opinion of Buchanan, J., in *Davis v. Calvert*, 5 Gill & J. 269; S. C., Redf. Am. Cas. on Wills, 420. After remarking that importunity and undue influence may be fraudulently exerted, but that they are not inseparably connected with fraud, he says: "Nor is it every degree of importunity that is sufficient to invalidate a will or testament. Honest and moderate intercession or persuasion, or flattery unaccompanied by fraud or deceit, and where the testator has not been threatened or put in fear by the flatterer or persuader, or his power or dominion over him, will not have that effect. That there may be great and overruling importunity and undue influence without fraud, which, when established, may and ought to have effect (under circumstances) to avoid a will or testament; such as the immoderate, persevering, and begging importunities and flattery of a wife who will take no denial, pressed upon an old and feeble man, which may be better imagined than described; or dominion obtained over the testator under the influence of fear, produced by threats, violence, or ill treatment. In neither of those instances may there be any direct fraud, but an overruling influence upon the mind and feelings of a testator, according to the degree of his judgment and firmness."

The doctrine is also laid down with great clearness by Lumpkin, J., in *Potts v. House*, 6 Ga. 359, quoting in part the language used by Mellen, C. J., in *Small v. Small*, *supra*. He says: "With respect to a will alleged to have been obtained by undue influence, I would remark, that it is not unlawful for a person by honest intercession and persuasion to procure a will in favor of himself or another; neither is it to induce the testator by fair and flattering speeches; for though persuasion may be employed to induce the dispositions in a will, this does not amount to influence in the legal sense. If a wife, by her virtues, has gained such an ascendancy over her husband, and so riveted his affections that her good pleasure is a law to him, such an influence can never be a reason for impeaching a will made in her favor, even to the exclusion of the residue of his family. Nor would it be safe to set aside a will on the ground of influence, importunity, or undue advantage taken of the testator by his wife, though it should be proved that she possessed a powerful influence over his mind and conduct, in the general concerns of life; but where persuasion is used with a testator on his death-bed, when even a word distracts him, it may amount to moral force, and may inspire fear: 4 Greenl. 229."

Where the persuasion does not proceed from selfish or interested motives, and is used merely to induce the testator to make just provision for other persons who are the natural objects of his bounty, it is not only lawful but

laudable; as in *Harrison's Will*, 1 B. Mon. 351, where a son of the testator persuaded him to give a part of his estate to the children of a deceased sister, who were in straightened circumstances, the testator's own children all being well to do.

In that case, Ewing, J., said: "This was an influence worthily exerted, free from selfish or sinister ends, and in behalf of others, who were as worthy objects of the testator's bounty as any of his own children, and which subtracted from the provision which the parent designed for the sons. We can not believe that such an influence should condemn a will. If by argument or reasons presented to the mind of a parent, by children or others, he becomes convinced, and makes his will accordingly, it is no less his will than if made by the voluntary action of his own mind, independent of such arguments or reasons. A man may be aided by the views of others in coming to a just conclusion in this matter of disposing of his property by will, as well as in any other transactions in life; and if the influence thus attempted is disinterested, no inference can arise that it was unduly or improperly executed, or that the deviser was deceived or deluded by unfair means into the publication of a will variant from his then deliberate judgment."

INFLUENCE GAINED BY KINDNESS AND AFFECTION will not be regarded as "undue," if no imposition or fraud be practiced, even though it induce the testator to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made: *Matter of Gleespin's Will*, 26 N. J. Eq. 523; *Barnes v. Barnes*, 66 Me. 297, approving the principal case. Indeed, the fact that a testator bestows the bulk of his property upon those who are around him, and who have attended upon him and cared for him, to the exclusion of others at a distance, furnishes a presumption in favor of the will, rather than against it: *Remsen v. Brinckerhoff*, 26 Wend. 340, per Verplanck, senator. Such a disposition is natural. "Kind and respectful attentions and ministrations to the wants and infirmities of age, necessarily have their influence in favor of persons bestowing them:" *Meeker v. Meeker*, 75 Ill. 260, per Walker, C. J. Confidential relations existing between the testator and beneficiary do not alone furnish any presumption of undue influence: *Lee v. Lee*, 71 N. C. 139. Nor does the fact that the testator on his death-bed was surrounded by beneficiaries in his will: *Bundy v. McKnight*, 48 Ind. 502. Nor the fact that the testatrix was dependent upon her daughter, in whose favor the will was executed, in all domestic and pecuniary affairs: *Bleecker v. Lynch*, 1 Bradf. 458. Nor that the testator, an old and helpless man, made his will in favor of a son who had for years cared for him and attended to all his business affairs, his other children having forsaken him: *Elliott's Will*, 2 J. J. Marsh. 340; S. C., Redf. Am. Cas. on Wills, 434. To the same purpose, see *Rutherford v. Morris*, 77 Ill. 397. A change in the will to gratify the wishes of an affectionate wife does not warrant a presumption of undue influence: *Rankin v. Rankin*, 61 Mo. 295. Nor the fact that nearly the whole estate was given to a second wife, to the exclusion of a child of the first wife: *Jackson v. Jackson*, 39 N. Y. 153. A second wife may rightfully exercise the proper influence of her position to procure a preference in her husband's will for her own children over those of the first wife: *Carmichael v. Reed*, 45 Ill. 108. An unequal, or even unjust, disposition of property prompted by gratitude, affection or esteem can not be said to proceed from undue influence: *Seguine v. Seguine*, 3 Keyes, 663. It would be a great reproach to the law if in its jealous watchfulness over the freedom of testamentary disposition, it should deprive age and infirmity of the kindly ministrations of affection, or of the power of rewarding those who bestow them.

UNDUE INFLUENCE MUST DESTROY FREE AGENCY.—It is well settled that in order to avoid a will on the ground of undue influence it must appear that the testator's free agency was destroyed, and that his will was overborne by excessive importunity, imposition or fraud, so that the will does not in fact express his wishes as to the disposition of his property, but those of the person exercising the influence: *Leverett v. Carlisle*, 19 Ala. 80; *Gilbert v. Gilbert*, 22 Id. 529; *Dunlap v. Robinson*, 28 Id. 100; *Taylor v. Kelly*, 31 Id. 59; *Pool v. Pool*, 35 Id. 12; *Hall v. Hall*, 38 Id. 131; *Leeper v. Taylor*, 47 Id. 221; *Kenworthy v. Williams*, 5 Ind. 375; *Noble v. Enos*, 19 Id. 72; *Rabb v. Graham*, 43 Id. 1; *Bundy v. McKnight*, 48 Id. 502; *Roe v. Taylor*, 45 Ill. 485; *Rutherford v. Morris*, 77 Id. 397; *Allmon v. Pigg*, 82 Id. 149; *Lucas v. Cannon*, 13 Bush. 650; *Barnes v. Barnes*, 66 Me. 297; *Davis v. Calvert*, 5 Gill & J. 302; *Tyson v. Tyson*, 37 Md. 567; *Monroe v. Barclay*, 17 Ohio St. 302; S. C., Redf. Am. Cas. on Wills, 442; *Browne v. Molliston*, 3 Whart. 129; *Hoge's Estate*, 2 Brewst. 450; *Eckert v. Flowry*, 43 Pa. St. 46; S. C., Redf. Am. Cas. on Wills, 418; *Farr v. Thompson*, Cheves, 37; *O'Neill v. Farr*, 1 Rich. 80; *Gardner v. Gardner*, 22 Wend. 526; *Seguine v. Seguine*, 3 Keyes, 663; *Gardiner v. Gardiner*, 34 N. Y. 155; *Brick v. Brick*, 66 Id. 144; *Rollwagen v. Rollwagen*, 63 Id. 504; *Childrens' Aid Soc. v. Loveridge*, 70 Id. 387; *Matter of Jackman's Will*, 26 Wis. 104; *Tobin v. Jenkins*, 29 Ark. 151; *Kinleside v. Harrison*, 2 Phill. 551; *Earl Sefton v. Hopwood*, 1 Fost. & F. 578; 1 Redf. on Wills, 518, *et seq.*, and cases cited. The testator must be constrained to do the act against his will: *Rabb v. Graham*, 43 Ind. 1. The undue influence must amount to moral coercion: *Eckert v. Flowry*, 43 Pa. St. 46; S. C., Redf. Am. Cas. on Wills, 418; *Barnes v. Barnes*, 66 Me. 297; *Childrens' Aid Soc. v. Loveridge*, 70 N. Y. 387. "There must be imprisonment of the body or mind:" *Browne v. Molliston*, 3 Whart. 129. Says Sir John Nicholl, in *Kinleside v. Harrison*, 2 Phill. 551: "I may perhaps preliminarily observe that importunity, in its correct legal acceptation, must be in such a degree as to take away from the testator free agency; it must be such importunity as he is too weak to resist; such as will render the act no longer the act of the deceased, not the free act of a capable testator, in order to invalidate an instrument."

The doctrine of the cases on this point is well stated by Miller, J., delivering the opinion of the court in *Childrens' Aid Soc. v. Loveridge*, 70 N. Y. 387, where he says: "In order to avoid a will upon any such ground, it must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist. It must not be the promptings of affection; the desire of gratifying the wishes of another; the ties of attachment arising from consanguinity, or the memory of kind acts and friendly offices, but a coercion produced by importunity, or by a silent resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear: 1 Jarm. on Wills, 36, 37; *Gardiner v. Gardiner*, 34 N. Y. 155; *Seguine v. Seguine*, 3 Keyes, 663; *Brick v. Brick*, 66 N. Y. 144."

The motive of the testator's action must be "tantamount to force or fear:" *Trumbull v. Gibbons*, 22 N. J. L. (2 Zab.) 117. This subjugation of the testator's will "may be accomplished by persuasions, importunities, force, threats or coercion of such character and degree that they cannot be resisted:" *Bundy v. McKnight*, 48 Ind. 502. The importunity which will have the

effect to invalidate a will made under its influence, must be an unlawful importunity, either in the manner or the motive of its exercise: *Potts v. House*, 6 Ga. 359. It was said in *Marshall v. Flinn*, 4 Jones L. (N. C.) 199; S. C., Redf. Am. Cas. on Wills, 413, that "the only influence which the law condemns, and which destroys the validity of a will, is a fraudulent influence controlling the mind of the testator, so as to induce him to make a will, which he otherwise would not have made." By "fraudulent influence" it is probably meant in this case that the influence must have been designed to procure the making of a will essentially different from that which the testator would have made, if left to himself.

INFLUENCE MUST BE SPECIALLY DIRECTED TO MAKING OF WILL.—To avoid a will on the ground of undue influence, it must undoubtedly appear that the influence was exerted upon the very act of making the will. The fact that the testator was under the general and even controlling influence of another person in the conduct of his affairs, will not suffice to invalidate the will, unless that influence was specifically exerted upon the testamentary act: *Hoge's Estate*, 2 Brewst. 450; *McMahon v. Ryan*, 20 Pa. St. 329; S. C., Redf. Am. Cas. on Wills, 417; *Eckert v. Flowry*, 43 Pa. St. 46; S. C., Redf. Am. Cas. on Wills, 418; *Seguine v. Seguine*, 3 Keyes, 663; *Carroll v. Norton*, 3 Bradf. 320; *Hazard v. Hazard*, 5 Thomp. & C. 79; S. C., 2 Hun, 445; *Rutherford v. Morris*, 77 Ill. 397. What is said in the principal case on this point is referred to with approval by Judge Redfield in 1 Redf. on Wills, 522, note 32, where he says, speaking of *Small v. Small*: "This is an important case, and the opinion by C. J. Mellen affords an able commentary upon the law." Then, after quoting a part of the chief justice's opinion, he continues: "This seems to define the true limits of influence to avoid a will. It is not sufficient to show that such general influence existed to any extent, unless there is proof that it was exerted in procuring the particular testamentary act in question." Proof of "undue influence long past and gone, and in no way shown to be connected with the testamentary act," is not evidence to impeach the validity of a will: *Per Woodward, J.*, in *McMahon v. Ryan*, 20 Pa. St. 321; S. C., Redf. Am. Cas. on Wills, 417. Undoubtedly, however, where such a general influence is shown to exist, and the will is unduly favorable to the party possessing such influence, the inference is strong that the influence was directly used to procure the will. The observations of Judge Redfield on this point are unquestionably sound. He says, 1 Redf. on Wills, 522, note 32: "Where the influence is shown to have been absolute and irresistible over the testator upon general subjects, and there were constant opportunities of exerting such influence, and the will is unreasonably and extravagantly in favor of the party possessing such influence, the inference is legitimate that it was the result of that influence. And such is unquestionably the fair conclusion in most cases, even although there should be probable evidence that no effort had been made in that direction for some considerable period before the will, by the person possessing the control of the testator, and in whose favor the will is made, as if it were executed in the temporary absence of such person. The obvious and natural connection between the power to control and the testamentary act being established, although mainly by their coincidence and adaptation to each other, the presumption will naturally arise that the temporary withdrawal of such effort at influence did not relieve the testator wholly from its effects: See, also, *Rabb v. Graham*, 43 Ind. 1; *Seguine v. Seguine*, 4 Abb. App. Dec. 191."

A somewhat similar, though, perhaps, less accurate statement of the same principle is made by Scott, J., delivering the opinion of the court in *Taylor v. Wilburn*, 20 Mo. 306; S. C., Redf. Am. Cas. on Wills, 412, where he uses the

following language: "Where a will is impeached for undue influence exercised over a weak intellect, and that, too, by one holding the close and constant relationship of a wife, it is not sufficient to show that the testator was not under restraint at the moment of the execution of the will. Such is the nature of the human mind, that when it has been habituated to the influence of another it will yield to that influence and suffer it to have its effect, although the person in the habit of its exercise may not be present, or exert it at the time an act is done. So that the inquiry, in such cases, is not whether an undue influence was exerted at the time of the execution of the will, but whether an influence had been acquired, and did operate in the disposition of his property by the testator." See, also, *Davis v. Calvert*, 5 Gill & J. 269; S. C., Redf. Am. Cas. on Wills, 420.

THE GENERAL RULE DEDUCED FROM THE CASES by Judge Redfield is that undue influence to avoid a will must be such as: "1. To destroy the freedom of the testator's will, and thus render his act, obviously, more the offspring of the will of others than of his; 2. That it must be an influence specially directed towards the object of procuring a will in favor of particular parties; 3. If any degree of free agency, or capacity, remained in the testator, so that, when left to himself, he was capable of making a valid will, then the influence, which so controls him as to render his making a will of no effect, must be such as was intended to mislead him to the extent of making a will essentially contrary to his duty; and it must have proved successful to some extent certainly." This rule is approved and applied in *Allmon v. Pigg*, 82 Ill. 149; see, also, *Gardiner v. Gardiner*, 34 N. Y. 155, and *Roe v. Taylor*, 45 Ill. 491. It is proper to remark, however, that although generally, if not universally, a will which is pronounced invalid as having been procured by undue influence, is in fact, one which is "essentially contrary" to the testator's duty in some particular, yet it is no doubt true, that even if a testator should really make a just and proper will under the influence of such moral coercion by means of threats, imposition, fraud, or excessive importunity, that it did not express his intentions, but those of the person who procured it to be made, such a will would be void. Unquestionably a testator has a legal right to make an unjust disposition of his estate if he will; and if he do otherwise, by reason of compulsion or constraint of any kind, or of any fraud or artifice, the act is not his will.

The cases illustrating the varied applications of the principles enunciated in the rule laid down by Judge Redfield are exceedingly numerous. In addition to those already cited in the course of this note the following are here referred to: *Harwood v. Baker*, 3 Moore, P. C. 282; *Tyler v. Gardiner*, 35 N. Y. 559; *Reynolds v. Root*, 62 Barb. 250; *Marvin v. Marvin*, 3 Abb. App. Dec. 192; *Bicknell v. Bicknell*, 2 Thomp. & C. 96; *Dennis v. Weekes*, 51 Ga. 24; *Wisener v. Maupin*, 58 Tenn. 342; see, also the cases cited in 1 Redf. on Wills, 518 *et seq.*

UNDUE INFLUENCE AS RELATED TO MENTAL CAPACITY.—The undue influence which will invalidate a will depends to a very considerable extent upon the intellectual capacity and firmness, or facility of disposition of the testator. Obviously, it requires much less influence to control the will of a person of weak mind and infirm purpose than one of vigorous intellect and determined character: *Rollwagen v. Rollwagen*, 63 N. Y. 504; *Rabb v. Graham*, 43 Ind. 1; *Walker v. Hunter*, 17 Ga. 364; *Eckert v. Flowry*, 43 Pa. St. 46; S. C., Redf. Am. Cas. on Wills, 418. Indeed, this question of undue influence generally arises only in cases where the testator is a person of impaired mental power and irresolute disposition. In such a case, if there are any

circumstances indicating that the testator was acting under any influence from another person in disposing of his property, the court will look very closely into the facts: *Williams v. Hunter*, 17 Ga. 364; but mental weakness will not of itself warrant any presumption of undue influence: *Eckert v. Flory*, 43 Pa. St. 46; S. C., Redf. Am. Cas. on Wills, 418.

ILLICIT RELATIONS BETWEEN TESTATOR AND BENEFICIARY.—Where a testator makes a will in favor of one who held illicit relations with him, to the exclusion of his lawful heirs, that fact is a circumstance to be considered by the jury in determining the question of undue influence: *Dean v. Negley*, 41 Pa. St. 312; S. C., Redf. Am. Cas. on Wills, 439; *Monroe v. Barclay*, 17 Ohio St. 302; S. C., Redf. Am. Cas. on Wills, 442; *Main v. Ryder*, 84 Pa. St. 217. Influence which might be properly exercised by a wife may be undue if exerted by a mistress: *Kessinger v. Kessinger*, 37 Ind. 341. And where there is evidence that one holding unlawful relations with the testator has induced him to provide for her children by pretending that they are his, the will will be avoided: *Davis v. Calvert*, 5 Gill & J. 269; S. C., Redf. Am. Cas. on Wills, 420. But a reasonable and proper provision for an illegitimate child, at the instance of the mother, will create no presumption of undue influence: *Rudy v. Ulrich*, 69 Pa. St. 177. And if there was in fact no improper influence, the mere existence of illicit relations between the testator and devisee will not invalidate the will: *O'Neill v. Farr*, 1 Rich. 80; *Dickie v. Carter*, 42 Ill. 376. And generally, though the existence of such relations is a fact to go to the jury upon the question of undue influence, no definite weight can be assigned to it: *Main v. Ryder*, 84 Pa. St. 217.

THOMPSON v. SNOW.

[4 GREENLEAF, 264.]

OWNER OF VESSEL, WHEN NOT LIABLE.—If a vessel is let to the master, on the shares, he victualing, manning her and paying a part of the port charges, and having absolute control of her, but yielding as compensation for the use a part of the net earnings, the liability of the general owners ceases. The master, in such a case, is the owner *pro hac vice*.

PARTNERSHIP, WHAT IS NOT.—If the owners of a vessel let her to the master, accepting as their compensation for her use, a certain portion of the net profits, this does not create a partnership.

ASSUMPSIT brought in the court of common pleas against the defendants, owners of the brig Milo, for the price of certain boards alleged to have been sold and delivered to them. It appeared that Hall, the master of the brig, purchased the boards for dunnage for a certain voyage. The defendants insisted that Hall had hired the brig and was the owner *pro hac vice*, and was, therefore, liable for the price of the boards. The plaintiffs offered the said Hall as a witness, but the defendants objected to his competency, on the ground of interest. The objection was, however, overruled. The substance of the witness's testimony is sufficiently stated in the opinion.

The defendants prayed the judge to instruct the jury that Hall had no authority to bind them, that there was no copartnership between them and him, and that they were not liable in this action. The judge, however, charged that if the jury were satisfied that when the boards were purchased, and during the voyage, the defendants continued to have control of the vessel, and directed or assented to the purchase, Hall, merely acting as master, receiving half the net earnings for his wages, the defendants were liable; and that if they should find that Hall and the defendants were jointly interested in the voyage and cargo, the boards having been procured on their joint account and with the defendants' assent, and that they were to share the profits and divide the losses, this constituted them copartners, and the defendants were liable though Hall was not joined; but that if they believed that Hall had chartered or hired the vessel for the voyage, he to pay for the charter one half the net earnings, and to have the exclusive control and management of the vessel, he became thereby the owner for that voyage, and was alone liable for the cargo. Verdict for the plaintiff. The defendants filed exceptions to the instructions.

Ruggles, for the exceptions.

Allen, contra.

By Court, WESTON, J. The defendants, if liable in this action, must be charged upon one of three grounds: As owners of the vessel; as copartners with the master in the shipment and voyage; or as having specially authorized the master to purchase the boards, for the value of which this action is brought, on their credit. Hall, the master, testifies that he took the brig on shares; that the terms were not the subject of express stipulation, either in writing or otherwise; but that he expected to have her according to the uniform usage of letting coasting vessels in St. George's river, from which he sailed, and in the vicinity; by which the master is to victual and man the vessel, to pay a portion of the port charges, and to yield to the owners, for her hire, a certain share of her net earnings. The owners must have had the same understanding of the terms in this case, as Hall further states that they settled with him, according to his views of the contract. It appears that Hall thereupon employed the vessel at his pleasure in several successive voyages, until she was finally stranded and sold; without communicating with the general owners upon the subject of her employment, or receiving any instructions whatever from them.

According to the cases of *Reynolds v. Toppan*, 15 Mass. 370 [8 Am. Dec. 110]; and of *Taggard v. Loring*, 16 Id. 336 [8 Am. Dec. 140]; especially the last, Hall must be regarded as the owner of the brig *pro hac vice*, and while she thus continued under his control, the liability of the general owners ceased, and was transferred to him. We refer to these cases for the reasoning from which this deduction is drawn. The same authorities show that in transactions of this nature, the general owners and the party who hires and employs a vessel upon these terms are not to be deemed copartners; for if they were, the defendants in both these cases must have been held liable, instead of being exonerated. That an agreement of this kind does not constitute a partnership, is further supported by the case of *Wilkinson v. Frazier*, 4 Esp. 182; and of *Meyer v. Sharpe*, 5 Taun. 74.

There is as little reason to charge the defendants upon any special authority given to Hall to purchase a cargo upon their credit. The only evidence to this point arises from the testimony of Hall, who says that he, not being able to find freight, Brown, one of the defendants, observed to him that he, Hall, must look out for a cargo, or had better look out for a cargo. As the compensation to the owners for the use of their vessel was to depend on her employment, it was for their interest that she should not be delayed; and this observation of Brown can be considered as nothing more than the intimation of a wish on his part that, if Hall would not procure a cargo on freight, he would obtain one by purchase. Hall further states that he proceeded to purchase a cargo; but had no conversation with the defendants as to what he should buy, of whom, or where the vessel should go, although Brown, one of the defendants, lived in his neighborhood. He adds, it is true that he told the plaintiffs to charge the boards to the owners, and that he did not consider that he was liable for them himself; but his directions or opinion can have no effect in determining the extent of his legal liability or theirs.

Upon this view of the evidence, it appears to us that the judge of the common pleas should have instructed the jury, as requested by the counsel for the defendants, that the said Hall had no authority to bind them; that the facts proved did not constitute a copartnership; and that the defendants were not liable in this action.

We have not deemed it necessary to consider the objection made to the competency of the witness, being satisfied that his testimony is insufficient to charge the defendants.

The jury not having been, in our opinion, properly directed in this case, the exceptions are sustained, the verdict set aside, and a new trial ordered at the bar of this court.

OWNER'S LIABILITY FOR MASTER'S CONTRACTS.—See, on this point, *Ward v. Green*, *post*, and cases cited in the note thereto.

LIABILITY OF OWNER OF CHARTERED VESSEL.—This subject is discussed, and many of the cases collected, in the note to *Pittin v. Brauerd*, 13 Am. Dec. 87.

KING v. UPTON.

[4 GREENLEAF, 387.]

FORBEARANCE TO SUE IS A SUFFICIENT CONSIDERATION to support a promise to pay the debt of another.

THE CONSIDERATION FOR THE PAYMENT OF THE DEBT OF ANOTHER need not be expressed in writing.

INTEREST OF WITNESS, MODE OF PROVING.—If, at the taking of a deposition, the adverse party interrogates a witness touching his interest in the suit, this is an election of the mode of proof, and none other can be resorted to at the trial.

ASSUMPSIT upon a guaranty signed by the defendant on the back of a note, dated March 8, 1820, made by one Jeduthun Upton, payable to the plaintiff on demand, said guaranty being as follows: "Boston, December 2, 1820. I hereby guarantee the payment of the within note." The consideration of said guaranty, as alleged in the declaration, is stated in the opinion. The plaintiff offered in evidence the deposition of one Joseph King, to which the defendant objected that the said King was interested in the event of the suit, which he offered to prove by other witnesses; but it appearing from the deposition that the defendant had interrogated the witness on that point, and that the latter had denied having any interest, the objection was overruled and the deposition admitted. The defendant further objected to parol proof of the consideration of the guaranty, which objection was also overruled. Verdict for the plaintiff, subject to the opinion of the court on these two points. The defendant also moved in arrest of judgment, because the promise of forbearance, alleged as a consideration of the guaranty, was not for any specified time.

McGaw, for the defendant.

Deane, for the plaintiff.

By Court, MELLAN, C. J. This case presents one question

arising on a motion in arrest of judgment; and two arising on a motion for a new trial, founded on the report of the judge.

In support of the first motion, it is contended that the declaration does not disclose a sufficient consideration for the defendant's promise; the alleged consideration being only that the plaintiff would "forbear and give further time" to Jeduthun Upton, the maker of the note, "for the payment of said note," without naming any particular time for the continuance of such forbearance. The declaration contains an averment that the plaintiff did "forbear and give further time for the payment of said note from the second day of December, 1820," being the day on which the defendant's promise was made, "to the fifteenth day of February, 1822," a few months before the commencement of this action. The authorities on this point have been examined, and they seem not to sustain the motion. In 1 Roll. Abr. 27, pl. 45, the law is laid down in these words: "So, if A. be indebted to B. in one hundred pounds, and B. is about to commence a suit for the recovery thereof; but C., a stranger, comes to him and says, that if he will forbear him, he, himself, will pay it, this is a good consideration for the promise; B., averring that he had abstained and forbore to sue A. *et adhuc*, did abstain and forbear, though no certain time was appointed for the forbearance; for it seems a perpetual forbearance is intended, the which he hath performed. So, if he will forbear *paululum temporis*, this is good; plaintiff averring a certain time of forbearance:" See, also, 1 Com. on Cont. 420. The principle, as last laid down, is perfectly applicable to the case before us, and appears to be a decisive authority. The motion in arrest of judgment is therefore overruled.

As to the motion for a new trial on the ground that the presiding judge excluded direct testimony, which was offered to prove the interest of Joseph King, we are well satisfied it must fail. He had been interrogated on oath by the defendant, and had expressly denied all interest in the event of the suit; and as the defendant had elected to prove the alleged interest of the witness in that manner, by appealing to his knowledge and conscience, though he failed so to prove the interest, he, by making this election, precluded himself from proving it by evidence *aliunde*. This rule has long been established, and invariably adhered to in case of *viva voce* testimony; and there seems to be no sound reason why the same rule should not govern in case of a witness deposing before a magistrate.

As to the objection to the admission of parol proof to show on what consideration the promise or guaranty of the defendant was founded, we consider the case of *Packard v. Richardson*, 17 Mass. 122 [9 Am. Dec. 123], as furnishing a most satisfactory answer. We have often and carefully examined that case and the able argument of the chief justice, and concur in the principles on which the decision reposes. It is needless for us to go into an argument on the question. We at once refer to it as an authority entitled to high consideration, decisive of the point before us, and as a clear, learned and convincing investigation of the whole subject. Accordingly there must be judgment on the verdict.

PROMISE TO PAY DEBT OF ANOTHER.—The law relating to the validity of promises to pay the debt of another within the statute of frauds, is very fully discussed in *Leonard v. Vredenburg*, 5 Am. Dec. 317, and in the note thereto. See also *Farley v. Cleveland*, 15 Am. Dec. 387, and cases cited in note.

EMERY v. HERSEY.

[4 GREENLEAF, 407.]

USAGE, COMMON CARRIER.—Where by the usage of the place goods shipped on freight are consigned to the master for sales and returns, the owners of the vessel are liable for the payment of the proceeds to the shippers. AN OWNER PRO HAC VICE OF A VESSEL is one who has the entire control and direction thereof, so that the general owner, for the time being, has no right to interfere in its management.

ASSUMPSIT for the value of a quantity of boards shipped on the defendant's sloop to Newburyport consigned to the master for sales and returns. The defendant filed an account in offset in which the plaintiff was charged, among other things, with the freight of the boards in question. The material facts are stated in the opinion. The judge in the court below charged that upon the evidence the defendant was not liable. Verdict for the defendant. The plaintiff filed exceptions, and the record was brought up on an assignment of the general error.

E. Shepley, for the plaintiff, contended: 1. That the defendant was liable as owner for the contract of the master, it not appearing that the latter had hired or chartered the vessel for a stipulated portion of the freight, so as to become the owner *pro hac vice*, within the principle of *Reynolds v. Toppan*, 15 Mass. 370 [8 Am. Dec. 110], and *Taggard v. Loring*, 16 Id. 336 [8 Am. Dec. 140], since the evidence did not show that he had

exclusive control and management of the vessel; 2. That the defendant was liable because he had adopted the act of the master by charging the plaintiff with the freight in the account filed in offset, and by claiming the freight-money from the witness Granger; and that the contract to sell and make returns was within the legitimate scope of the master's authority to bind the owner, resting on the same principles as the contract to carry the goods: *Kemp v. Coughtry*, 11 Johns. 107; 3. That the defendant, if not liable as owner, was liable for money had and received, he having taken from Granger the money deposited with the latter by the master for the plaintiff, since he had no rightful claim to the money unless he was responsible as owner: 1 Com. Dig., Assumpsit, E, 205; *Hall v. Marston*, 17 Mass. 575; *Arnold v. Lyman*, Id. 400 [9 Am. Dec. 154]; *Mason v. Waite*, Id. 560.

Greenleaf, for the defendant, claimed: 1. That the master alone was liable, he being the owner *pro hac vice*: *Abbot*, 184, 31; *Reynolds v. Toppan*, 15 Mass. 370 [8 Am. Dec. 110]; *Taggard v. Loring*, 16 Id. 336 [8 Am. Dec. 140]; *Frazer v. Marsh*, 13 East, 238; *McIntire v. Brown*, 1 Johns. 229; *Hallet v. Columb. Ins. Co.*, 8 Id. 272; *Thompson v. Snow*, 4 Greenl. 264, *ante*, 263; *Vallejo v. Wheeler*, Cowp. 143; 2. That in any event the defendant was liable only for the safe delivery of the goods at the port of destination, and not for the master's acts as consignee: *Poth. Mar. Con.* 22; *Jacobsen's Sea Laws*, 222; *United Ins. Co. v. Scott*, 1 Johns. 106; *Abbot*, 178, note, 132, 137.

By Court, WESTON, J. It appears in the case before us, that the defendant's sloop was employed in carrying wood and lumber, on freight, from Saco river, and that the plaintiff shipped on board said sloop, on freight, a certain quantity of lumber to be sold by the master, and the net proceeds paid over to the plaintiff.

Owners of vessels employed in the transportation of property, are common carriers, and liable to the responsibilities which by law attach to persons engaging in that business. They are made answerable for the safe carriage and delivery of all goods entrusted to them, their servants or agents, unless a loss be occasioned by the act of God or a public enemy. One of the objections taken in defense is, that if a liability ever attached to the defendant, it terminated upon the delivery of the lumber in Newburyport, and that the subsequent sale and disposition of it there, constituted no part of the duty of the owner or carrier

that he derived no benefit from it, and that in this part of the business the master was made the special agent of the plaintiff, and that he ought to look to him alone. It is in testimony in this case, that the usage in Saco is, when lumber is shipped on freight, for the master to sell it, and bring home the money, and pay it over to the shipper, unless otherwise directed. The freight or compensation, therefore, paid by the shipper, is a remuneration, not only for the carriage of the lumber, but for all the care and labor bestowed upon it by the master, until his trust is fulfilled. In the whole business the master acts within the scope of his employment, and we entertain no doubt that the owner is liable for the faithful performance of every duty undertaken by the master in regard to the property, according to the usage proved. The case of *Kemp v. Coughtry*, cited from 11 Johns. 107, is an authority directly in point.

But it is principally insisted that the master in this case was owner *pro hac vice*, and therefore the general owner not liable. If this fact had been established, the position is well founded. To constitute the hirer owner *pro hac vice*, he should have the possession, and the entire control and direction of the vessel; so that the general owner, for the time being, would have no right to interfere with the management: 2 Barn. & Ald. 503; *Reynolds v. Toppan*, 15 Mass. 370 [8 Am. Dec. 110]; *Taggard v. Loring*, 16 Mass. 336; [8 Am. Dec. 140], cited in the argument. In this case he was to victual and man the vessel, and to have one half the freight-money, and five dollars on each trip, for his compensation; but it is nowhere testified that he was to have the control of the vessel. On the contrary, it appears that the defendant claimed to interfere in her management as owner. The master testified that for some prior trips he had contracted for the freights, but under the special direction of the defendant, who employed him for this purpose; because he said he could make the best bargain. He further testified that he sometimes settled with the freighters, and sometimes the defendant. It is proved by Joseph Granger, that he made the agreement with the defendant to freight the vessel with wood for the very trip when the plaintiff's lumber was carried, which was received on board in consequence of the failure of Granger to furnish a full load. It also appears that the defendant demanded, as his own, and actually received the freight earned by the vessel for this trip; including that which arose from carrying the plaintiff's lumber. The conduct of the defendant clearly negatives the assumption that the master had the con-

trol of the vessel; or that he stood in the relation of owner *pro hac vice*. His right to a portion of the freight, was only the stipulated mode of compensation.

The case of *Thompson v. Snow*, 4 Greenl. 264 [*ante*, 263], cited for the defendant, varied essentially from the one before us. It appeared there that the master had the entire management of the vessel, without the interference of the owners for several successive voyages; and until she was stranded and sold.

The opinion of the court is, that the general error is well assigned; that the judgment be reversed; and that a new trial be had at the bar of this court.

OWNER'S LIABILITY ON CONTRACTS OF MASTER.—See *Thompson v. Snow*, *ante*, 263, and *Ward v. Green*, *post*, and the cases referred to in the notes to those decisions.

LOW'S CASE.

[4 GREENLEAF, 439.]

IMPRACHING INDICTMENT BY OATH OF GRAND JURORS.—Grand jurors may be examined as witnesses to show whether the necessary number concurred in finding an indictment.

THE WANT OF THE CONCURRENCE OF GRAND JURORS in the finding of an indictment may be shown, on motion in writing, in the nature of a plea in abatement, when the defendant is arraigned.

INDICTMENT for the forgery of a deed. The indictment was found at April term in York county. At September term the defendant was brought in to plead, filed a motion under oath, alleging in substance that the indictment was not found by twelve grand jurors, but simply by a majority of the panel at that time, and moving for leave to prove that fact by the foreman and four others of the grand jury. The affidavits of the grand jurors named were taken *de bene esse*. The foreman and two of the grand jurors swore that less than twelve concurred in the indictment. The others were not positive on that point, but they all testified that they were under the impression at the time that it was sufficient if a majority of the grand jury concurred in finding the indictment. The motion was thereupon adjourned to this term for argument.

E. Shepley and Daveis, for the motion, argued: 1. That by the constitution of Maine it was indispensable to the validity of an indictment that it should be concurred in by twelve grand jurors; that to make this requirement effective it was the right of

an accused person, if he could do so, to prove that the indictment against him was not so found, by the testimony of the grand jurors themselves, since there could be no other evidence of it; and that, on ascertaining that fact, by whatever means, it was the duty of the court to quash the indictment: 2 Hawk. P. C. 307; *Commonwealth v. Smith*, 9 Mass. 107; *United States v. Coolidge*, 2 Gall. 367; 2. That this was no violation of the grand jurors' obligation of secrecy, which related only to the counsel or opinions of themselves and their fellows and of the state, and not to extrinsic facts, such as the testimony of a particular witness, who afterwards swears differently: 1 Chit. Crim. Law, 260; 2 Bl. Com. 126, note 5; or where in actions for malicious prosecution it is necessary to show who was the prosecutor: 3 Selw. N. P. 945; *Thompson v. Mussey*, 3 Greenl. 305; 3. That grand jurors are officers of the court, and it is the duty of the court to inquire into their misprisions or improper conduct at the suggestion of the aggrieved party: 12 Co. 98; 3 Inst. 33; 4. That this was no contradiction of the record, which did not state that twelve grand jurors concurred; and besides, the rule against contradicting the record relates only to formal pleas, and not to a mere motion or suggestion before verdict, which is the proper method of bringing the facts before the court: 4 Com. Dig. 384, Indictment, A; 9 Mass. 109, 110; 2 Pick. 563; and further, that the object here was to show that the pretended indictment was not a record.

The Attorney-general, contra, contended: 1. That a proceeding like the present was against public policy, as by removing the protection of secrecy from the deliberations of grand jurors, they would be exposed to malice and corrupting influences on the part of accused persons; 2. That it was against law and immemorial usage, which had ever jealously guarded the secrecy of the grand jury room: 4 Bl. Com. 126; 2 Hawk. P. C., c. 46, sec. 93; 1 Chit. Crim. Law, 496; 3. That the record was the best evidence, and could not be contradicted by parol: *Commonwealth v. Smith*, 9 Mass. 110; 4. That neither traverse jurors nor grand jurors are to be admitted to impeach their findings or to prove their own misconduct or that of their fellows: *Grinnell v. Phillips*, 1 Mass. 543; *Commonwealth v. Drew*, 4 Id. 399; *Jackson v. Williamson*, 2 T. R. 281; *Davis v. Tucker*, 4 Johns. 487; *Haskell v. Becket*, 3 Greenl. 92; *Taylor v. Greely*, Id. 204.

After the argument the attorney-general obtained leave to take the affidavits of other members of the grand jury *de bene esse*.

WESTON, J. In the case before us, no objection was made to the indictment at the term in which it was found. The party accused has not been recognized to appear at that term, nor was he required to answer, nor did he appear, until the succeeding term. He then made the motion now under consideration, to the presiding judge, who received the affidavits of the foreman and of four other jurors, *de bene esse*, and ordered the continuance of the indictment and of the motion, that it might be determined by the whole court. The preliminary question now presented is, whether the court will so far sustain the motion as to go into an examination of the facts upon which it is founded.

The concurrence of twelve grand jurors is necessary to find a bill. The party accused can not be legally held to answer upon the finding of a less number. And this privilege is secured to the citizen, in crimes capital or infamous, by the provisions of the constitution. These positions are not denied, but it is insisted that when an indictment is once verified by the attestation of the foreman of the grand jury, that it is a true bill, and as such been presented to the court and ordered to be put on file, it then becomes a matter of record, and furnishes conclusive and incontrovertible evidence that it was found by the requisite number. I am satisfied that an indictment thus sanctioned is to be regarded as a record, and that it has all the legal verity which belongs to that species of evidence; and I admit that according to our practice it proves the fact that twelve or more agreed to the bill. I think the certificate of the foreman must be necessarily understood as implying this, and as constituting the proper evidence of the fact, it not here appearing in the caption that it was found by twelve men, according to the usage in England. But while I recognize the absolute certainty which a regular judicial record carries with it, and the policy upon which it is founded, I am also of opinion that there is, and always has been, and from the necessity of the case must be, a power in the court to vacate, or to cause to be amended, a record which has been erroneously or falsely made, by inadvertency or otherwise, by any of its officers. I entertain no doubt that the court may exercise this power at any time, according to their discretion, but unquestionably while a criminal prosecution or a civil suit is yet in progress and has not finally terminated. It is not to be understood that the rights of parties are to be concluded, and that without remedy, by the errors and mistakes, to say nothing of the fraud, of a record.

ing officer. To subject a record to the superintending and revising inspection of the court, is not to impair the rule of evidence under consideration. That there may be an end of controversy in regard to facts the truth of which has been established in judicial proceedings, no averment or proof is received against a record; but it is competent for the court to say, if they are satisfied that the claims of justice require it at their hands, this is not our record; it is false and erroneous, and the authentication which it bears is unauthorized and unwarranted.

The return of the sheriff, upon mesne or final process, has the character of a record; and as such is incontrovertible, and yet it is no uncommon practice for the court in their discretion, to permit him to amend it. And upon the suggestion of the clerk that an error has crept into the record, through the inadvertency either of himself or his substitutes, the court being satisfied of the truth of the suggestion, do not hesitate to order its amendment.

It is well known that in our practice, when the grand jury come into court, upon being inquired of whether they have agreed in any bills, and the foreman answering in the affirmative, he is directed to hand them in; whereupon they pass from his hands, through the intervention of an officer, to the clerk. They are not read over, nor is the substance of them stated, or the persons named against whom they are found. It is taken for granted that the foreman returns only such as the requisite number have concurred in; but no inquiry is made of his fellows, nor is it made known to them at the time, what bills are passed over to the court. Let it be supposed that after they have been received, and ordered to be filed, and the grand jury discharged, it should happen to be suggested to them that among the number is one charging a certain citizen with a certain crime. If, therefore, every juror, except the foreman, should present himself and offer his affidavit that he never agreed to such a bill, is there no power in the court to receive such testimony, and if assured of its truth, to give relief? Or if the foreman, after the grand jury has been dismissed, discovering his mistake, should suggest to the court, and offer to support his statement by oath, and by the corroborating testimony of every member of the jury, that the attorney-general had drawn two bills against a party accused, one for murder and one for manslaughter, and had left them with the jury, that they might make use of one or the other, as they might find the facts; that a competent number of

them had agreed, in the bill, for manslaughter; but that he had since discovered that he had inadvertently signed and presented as true the bill for murder, to which they had not agreed; is the judicial power so defective that this error must remain without correction? If so, the life of a citizen may be brought into jeopardy, in violation of both his legal and constitutional rights, under the pretense of a necessary adherence to the letter of a technical rule.

It may be said that to permit an inquiry of this sort would open the door to great abuses; that it would afford opportunity to tamper with the jury; and that it would lessen the respect due to the forms and solemnities of judicial proceedings. These are considerations, which address themselves strongly to the attention of the court, and can not fail to have a deep influence in the exercise of their discretion. It could only be in a very clear case, where it could be made to appear manifestly, and beyond every reasonable doubt, that an indictment, apparently legal and formal, had not in fact the sanctions which the law and constitution require, that the court would sustain a motion to quash or dismiss it, upon a suggestion of this kind.

The oath of the grand juror requires him to keep secret the state's counsel, his fellows' and his own. Of this character may be, what particular jurors agreed or dissented upon the questions whether a true bill or not; and also the testimony exhibited before them, or such parts of it as the attorney-general may wish to keep secret until developed at the trial. But the fact, whether twelve or more concurred or not in the bill, is not a secret. It is a result which they are required, through their organ, the foreman, to make known; and it is of the deepest importance to the public and to the accused that it should be truly disclosed.

There might have been less difficulty in supporting this motion, if it had been made at the first term, when the facts were fresh in the recollection of the jury; but their mistake, it is stated, had not been then discovered, and the party charged was not before the court. It is understood that the foreman, who signed this bill, happening to be present at the succeeding term, was from the charge of the judge to the grand jury, apprised that a bill could be found only by twelve or more; whereas he had before supposed that a majority was sufficient. Finding that his mistake had operated to the prejudice of Low, the defendant, he disclosed the fact; and he now states in his affidavit, if it can be received, that although a majority of the

jury agreed in finding the bill, that majority did not consist of twelve. If the mistake had been discovered before the discharge of the grand jury, better and more satisfactory means of ascertaining it would have been afforded. But it appears to me that the door to further inquiry is not therefore necessarily closed; and that this presents a case, in which the superintending power of the court, in correcting any mistakes which may arise in its proceedings, may and ought to be exercised; and that the testimony offered in support of the motion, together with any counter evidence, which may be adduced on the part of the state, ought to be received.

The conclusion to which I have arrived is not, I apprehend, without authority. In 2 Hawk. 307, cited in the argument, it is stated that if it appear, from the caption or otherwise, that less than twelve jurors agreed in the indictment, it must be quashed. In the *Commonwealth v. Smith*, also cited, Sewall, J. who delivered the opinion of the court, adverting to the principle that indictments, not found by twelve good and lawful men, are void and erroneous at common law, says: "An irregularity in this respect, if it should happen, might become a subject of inquiry, upon a suggestion to the court." This position is not inconsistent with what he afterwards states, that no averment to this effect can be admitted by a formal plea. No averment by way of plea can be received against a record; but the court may determine, upon suggestion, whether that which is apparently a record is in truth entitled to that character. The judge further intimates that objections to the personal qualifications of the jurors, or to the legality of the returns, are to be made before the indictment is found. In *The Commonwealth v. Parker*, 2 Pick. 563, the court do not appear to approve of this limitation, stating that "there is a difficulty in the case; for a bill may be found against a person who has not been recognized to appear, and who has no opportunity to challenge." But after the grand jury is returned and impaneled, the question whether an indictment, presented to the court as a true bill, was assented to by twelve or more, is in its nature subsequent to any which may be raised as to their personal qualifications.

PREBLE, J. Among the indictments presented at a previous term to this court in behalf of the grand jury by their foreman, was found a bill, purporting to be an indictment in due form of law against the defendant for forgery. A capias issued as, of course, returnable at the next term; and the defendant having been arrested by the sheriff in vacation, appeared at the

next term to abide the order of the court in the premises. On being called for the purpose of being arraigned, he prayed that he might not be held to answer for the crime charged, nor be put upon trial on the bill read to him, suggesting to the court in writing that no twelve of the grand jurors concurred in finding the bill, laid before them by the attorney-general, to be a true one; and, therefore, that no indictment had ever, in truth, been found by the grand jury against him, and that the foreman of the grand jury had certified the bill as a true bill, through mistake of law. This suggestion the defendant verified by his own affidavit, and further offered to prove the facts suggested by the foreman, who certified the bill, and by several of the grand jurors, his fellows, then present in court. The defendant, therefore, made his suggestion, and prayed the court to inquire into the facts, at the first moment he had an opportunity to be heard in court, and he made it in the most solemn form, accompanied by a tender of the most certain, direct and ready means of ascertaining the truth of the facts suggested by him. No laches, therefore, are imputable to him. He has lost no right by neglecting to avail himself of it in due season. And we are called upon to decide the present preliminary question, on the assumption that the facts suggested by the defendant disclose the true interior state of the case. It is provided in the bill or declaration of rights, that "no person shall be held to answer for a capital or infamous crime, unless on presentment or indictment of a grand jury," except in certain specified cases, among which the case at bar is not one. By immemorial usage, and the well known principles of the common law, no presentment can be made, or bill of indictment found by a grand jury, unless twelve at least of their number concur in so doing. These principles were deemed so important to the security of the citizen that, to preserve them inviolable from the spirit of innovation and encroachment, they were engrafted from the common law into our constitution. Here we find it expressly ordained that in regard to juries, "their usual number and unanimity in indictments and convictions shall be held indispensable." And in this connection I may take occasion to remark, it is the boast of the common law, that for every violation or infringement of a right recognized by law, there is a certain and effectual remedy, or mode of enforcing that right, provided, if not by special enactment of the legislature, by the very genius of the common law itself. Here, too, I may observe that while in the process, forms of action, dec-

larations and pleadings in civil suits, the law is incumbered with technicalities, and rendered complex and unintelligible to all who have not made it an object of special study; in criminal prosecutions, so far as the accused is concerned, the proceedings are free from intricacy, and partake of the most simple and intelligible character. On the other hand, the precision and nicety required to be observed on the part of the prosecution, are so many guards and defenses interposed to protect and preserve the accused. Even matters of form become, in an indictment, matters of substance in his behalf. So, also, the principles adopted by the courts of law in regard to the course of proceedings in criminal cases, and the effect of those proceedings, were never intended or understood to debar the accused from asserting his rights, but to give him full opportunity to vindicate and maintain them. Now, according to these principles, admitting the fact to be as suggested by the defendant, there ought to be a time, and mode, in which he may avail himself of the objection, and claim his constitutional right not to be held to answer. It seems to be clear, as well on principle as on authority, that the objection can not be taken by way of formal plea. The very nature of the objection is prior in order to that of a plea; for it is an objection to being held to answer or plead in any form. It goes not to the abating or answering of the indictment, but to its annihilation; to the denying that it ever had legal existence. If, therefore, the objection can be made at all, the course which the defendant has adopted seems to be the proper one.

According to the English practice, it is necessary to state in the caption of every indictment, that it was found on the oath of twelve men. But the caption of an indictment is no part of the indictment itself, and the facts recited in the caption are no part of the finding of the grand jury. Hence, in certain cases, the caption may be amended, under the authority and sanction of the court, and made agreeable to the truth of the case: 1 Saund. 248, in note; 249, note 1. Hence, also, according to the authority cited in argument from Hawk. book 2, c. 25, sec. 16, if it appear by the caption, or otherwise, that less than twelve concurred in the finding, the indictment is erroneous. The grand jury and their proceedings are under the general superintendence of the court; and the court will institute inquiries, where necessary to protect the rights of the citizen. Irregular and illegal proceedings, in important particulars, will vitiate their findings: *United States v. Coolidge*, 2 Gall. 364;

Commonwealth v. Smith, 9 Mass. 107. It seems to me, therefore, to be alike at variance with the constitutional right of the citizen, and the principles of the common law, with the general course of proceedings in criminal trials, with analogous cases, and with the general superintending power and duty of the court; that the court should be solemnly made acquainted with the fact, that through mistake of the law, ignorance of his duty, or malicious design, the foreman of the grand jury had certified and delivered into court a bill, as a true bill, which had never been found by the jury, and yet the court not have the power to institute any inquiry into the subject; nor to interfere and arrest the evil, and prevent further wrong. Our practice in regard to the form of captions, and to the mode of delivering indictments into court differs in some respects from that which obtains in England; but it was from an enlarged view of the whole subject, as I apprehend, as well as from analogy to the rules and principles adopted by the English courts, that Mr. Justice Sewall, that eminent lawyer and most excellent judge, was led to remark in *Commonwealth v. Smith*, "an irregularity in this respect, if it should happen," (namely of an indictment not found by twelve men), "might become a subject of inquiry upon a suggestion to the court."

But there is a view of this subject, already alluded to, which is in a manner peculiar to our own state. In construing constitutional provisions, courts have, for the purpose of carrying into effect the intent of the people, as expressed in their constitution, considered those provisions, where they are not manifestly merely directory, as operating by their own proper power, independent of legislative enactments. And of such paramount authority are these provisions that even an act of the legislature contravening them is void. If, therefore, there had been any mere technical rule of the common law in existence, prior to the adoption of our constitution, which inhibited the court from looking into the true interior state of the facts in such a case, as the defendant had suggested to us, our constitutional provision, that in regard to juries, "the usual unanimity in indictments shall be held indispensable," would so far modify that rule as not only to justify, but to render it the duty of the court to take the necessary measures to see that the constitution itself was not violated, by holding a person to answer for an infamous crime, on indictment of less than twelve good and lawful men of the grand jury. Such a rule is inconsistent with these provisions of the constitution. For, if it could still

exist, unmodified and in its full extent, it would render these provisions merely directory, and that not to the courts, but to the grand juries. And should a grand jury disregard the direction, there would be neither prevention nor adequate remedy for the party aggrieved.

But I am satisfied that no such rule, precluding all inquiry into the true state of the facts, does exist at common law. The reasons already assigned afford a strong presumption against the existence of any such rule. The authority of Sewall, J., that inquiry may be made, is directly in point; and that of Hawkins seems equally clear. All the authorities concur that unless twelve good and lawful men of the grand jury do agree in finding the bill, the indictment is void and erroneous. Now, every grand jury consists of twelve men, at least; and according to our practice it never does appear whether a greater or less number concurred in finding the bill, because there is no reference to the number in the caption. That twelve did concur, is matter of inference merely, from the fact that the bill is regularly signed by the foreman, and delivered into court in the usual manner. Now, for courts to be solemnly resolving, and legal writers of the first eminence to be gravely stating, as matter of settled law, that if twelve, at least, of the grand jury do not concur in finding the bill, the indictment is void and erroneous, seems to me to be very idle, to say the least of it, if the party interested is not permitted to suggest the fact, and the court are precluded from inquiry into the subject, or allowing the party to avail himself of the error. I would borrow the language of Lord Mansfield, in *Rex v. Atkinson*, changing what should be changed: "Courts have invariably proceeded on the same idea, as a fundamental rule, that a fiction of law shall never prevail, against the truth of the fact, to defeat the ends of justice." Besides, there is something so purely artificial in the reasoning urged in support of the rule contended for, and something so seriously repugnant to the plain, unsophisticated sense and perceptions of things in the doctrine, that I could not bring my mind to acquiesce in the principle but in submission to the most clear and unquestionable authority. I concur with my brother, therefore, in the opinion that it is competent for the court to go into the inquiry, as prayed for by the defendant.

The question already disposed of involves in itself the principal difficulty. The objection that admitting the inquiry may be instituted, the grand jurors can not be permitted to testify.

seems to be entitled to less consideration; because if we can not inquire of them, the right to institute the inquiry is, after all, but a nominal one. The grand jury is supposed to be placed in some appropriate apartment, secure from the scrutiny of eavesdroppers and listeners. No person is permitted to be present during their deliberations, nor at the taking of the question on finding a bill. It would be a serious objection to their proceedings, perhaps, if even the law officer of the government was present at such a period. How any juror voted, is a secret no juror is permitted to disclose; but whether twelve of their number concurred in finding a bill, is not a secret of the state, their fellows, or their own. It is a fact they of necessity profess to disclose every time they promulgate their decision upon any bill laid before them. Accordingly, we are of opinion that it is proper under the circumstances of this case, and on the suggestion made by the defendant, for the court to inquire into the truth of the statement laid before them; and that the defendant may, if in his power, prove his statement by the foreman and his fellows of the grand jury. But it must be remembered that, the indictment being in due form, indorsed as a true bill by the foreman, the inference is that the fact is not as the defendant states it to have been; an inference not to be controlled by vague, uncertain or doubtful testimony. He will, therefore, be held to make out his case to the entire satisfaction of the court, so as to leave no doubt on the subject.

GRAND JURORS' TESTIMONY TO IMPEACH INDICTMENT. There is considerable conflict both among text-writers and in the cases as to the admissibility of testimony of grand jurors to impeach an indictment presented by them. In 1 Whart. Am. Crim. Law, sec. 509, it is said: "The better opinion is that an affidavit of a grand juror will not be received to impeach or affect the finding of his fellows, even for the purpose of showing how many were present when the bill was found, or how many voted in its favor." And the distinguished author of that treatise reiterates the same opinion in more direct language in his recent work on evidence: 1 Whart. Ev., sec. 601; see, also, Hirsch on Juries, sec. 758. Professor Greenleaf, on the other hand, while conceding that such testimony is not admissible to show how any of the members of the grand jury voted, or what opinions they expressed, affirms that "grand jurors may be asked whether twelve of their number actually concurred in the finding of a bill, the certificate of the foreman not being conclusive of that fact:" Greenl. Ev., sec. 252. An examination of the cases shows a similar difference of opinion upon this subject.

NOT ADMISSIBLE COLLATERALLY.—It seems to be settled, however, if the testimony of a grand juror is admissible in any case to impeach an indictment, it is at least not admissible collaterally, as, for instance, on the trial before the traverse jury. Thus, in *People v. Hulbut*, 4 Denio, 133, the defendant offered one of the grand jurors as a witness on the trial of an indictment

charging the defendant with five different offenses, to prove that only one offense was shown before the grand jury, and the testimony was rejected. Bronson, C. J., delivering the opinion of the appellate court, said: "Here, the evidence which the defendant proposed to give could amount to nothing less than an impeachment of the grand jurors. They had found a bill charging the defendant with five different offenses; and the substance of the offer was to show that only one offense had been proved before them. It cannot be proper to allow the jurors to be thus assailed. To permit the question to be tried over again in another place, whether the indicting jurors had sufficient evidence, or any evidence, to warrant their finding, would be plainly contrary to the policy of the law, which in everything that may affect the jurors themselves, has placed the seal of secrecy upon their proceedings.

"There is a further objection to the evidence which the defendant wished to give. The indictment, when presented in due form by the grand jury, and filed in court, is a record; and, like other records, imports absolute verity. It can not be impeached, unless it be done upon motion, by showing that it was not founded upon sufficient evidence, or that there was any other fault or irregularity in the proceedings. It can neither be done by plea averring against the record, nor by evidence on the trial. In *Low's case*, 4 Greenl. 439, the grand jurors were allowed to testify that they acted under the mistaken impression that it was sufficient if a majority of the jurors concurred in finding the bill; and that twelve of their number had not in fact agreed to the bill in question. But this was not on a trial before the traverse jury, but on a motion; and the court fully recognized the distinction between attacking a record in a collateral proceeding and a motion to set aside or amend it. So long as the record remains no defect in the evidence upon which it was founded, nor any irregularity in the proceedings, however great, can furnish any answer to it. But when the ends of justice require it, a record may be set aside on motion; and when set aside, that is an end of it. If the defendant, instead of pleading and going to trial on the indictment, had moved to quash or set it aside, or to strike out the first four counts, it is possible that the motion would have been granted. But that is a question on which I do not intend to express any opinion. On the trial, neither the court nor the jury could have anything to do with the proceedings in the grand jury room. Their only office was to inquire whether the defendant was guilty of the offenses laid to his charge."

It was conceded also in *People v. Shattuck*, 6 Abb. New Cas. 33, by Sheldon, C. J., of the superior court of Buffalo, that the indictment could not be thus collaterally impeached.

ADMISSIBILITY OF SUCH TESTIMONY ON MOTION TO SET ASIDE.—The question of the admissibility of affidavits of grand jurors to impeach the indictment on a direct motion to set it aside, is one of greater difficulty. The decisions on this point are of two classes: 1. Where the indictment is attempted to be impeached, by showing that it was found upon insufficient or improper evidence; 2. Where the prisoner endeavors to show that the indictment was not, in fact, concurred in by the number of grand jurors required by law.

SHOWING INDICTMENT FOUND ON INSUFFICIENT EVIDENCE.—It is entirely clear upon the authorities that where an indictment is in fact concurred in by a legal number of grand jurors, testimony of members of the grand jury is not admissible, either on the trial, or on a motion to set aside, for the purpose of showing that the indictment was found on insufficient grounds. The court will "in no instance inquire into the character of the testimony which has

influenced the grand jury in finding an indictment, with a view to the quashing of the indictment:" *State v. Boyd*, 2 Hill, (S. C.) 288. Thus it was held in *State v. Fasset*, 16 Conn. 458, that it was not admissible to show by the testimony of grand jurors that some of the witnesses examined before the grand jury were not duly sworn, or that incompetent evidence was received. To the same effect was the decision in *State v. Beebe*, 17 Minn. 241. So in *Tark v. State*, 7 Ohio, 595, it was held inadmissible to impeach the indictment, by showing that one of the grand jurors who concurred therein, did so without having heard the testimony: See, also, *People v. Hulbut*, 4 Denio, 133, and the opinion of Bronson, C. J., therein quoted above.

SHOWING INDICTMENT NOT FOUND BY LEGAL NUMBER.—The preponderance of authority seems to be somewhat against the doctrine laid down in the principal case, that on a motion to set aside an indictment, the affidavits of grand jurors are admissible to show that such indictment was not concurred in by the requisite number of grand jurors. Thus, in *The King v. Marsh*, 6 Ad. & El. 236, a motion was made for a rule to show cause why the indictment should not be quashed, and an affidavit of the foreman of the grand jury that one of the grand jurors did not vote on the indictment, and that the votes of the others were evenly divided was offered, but the court refused to receive it, on the ground that they could not act upon what transpired in the grand jury room. So in *State v. Baker*, 20 Mo. 338, it appeared that after a change of venue had been granted, the indictment was dismissed, on motion based on affidavits of some of the grand jurors that the requisite number to find an indictment did not vote; but the supreme court held that this was error, because such a practice was against the policy and positive provisions of the law requiring proceedings of grand juries to be kept secret, and would expose grand jurors not only to intimidation, but to corruption, by persons accused of crime, and also because the statutes of that state declared in express terms that no grand juror should "be obliged or allowed to declare in what manner he or any other member of the grand jury voted." Ryland, J., delivering the opinion of the court, said: "By our law, when the grand jurors by their foreman, in presence of the body, return an indictment into court as a true bill, it then becomes a part of the records of the court, and it should not be subjected to the attacks of parol proof by the members of the very body, who, in presence of their foreman, stood by in silence and saw him present it to the court. Incalculable mischief must result to the public at large from such a course of proceeding.

"The counsel for the prisoner in this case rely upon the case of the supreme court of Maine, reported in 4 Greenl. 439, *Low's case*: 'Grand jurors may be examined as witnesses in court, to the question whether twelve of the panel actually concurred or not in the finding of a bill of indictment, under art. 1, sec. 7, of the constitution of Maine.' This case also shows that 'if an indictment is found without the concurrence of twelve of the grand jury, this may be shown to the court by motion in writing, in the nature of a plea in abatement, made at the time when the defendant is arraigned.' This is the head note of *Low's case*. I know not whether there be any such prohibitory statute against grand jurors testifying in Maine as we have here. This case may be under some peculiar manner or mode in Maine, under their constitution; yet the judges appear to rely very much on a remark of Judge Sewall of Massachusetts in *Commonwealth v. Smith*, reported in 9 Mass. 107. Judge Sewall says: 'Indictments not found by twelve good and lawful men, at least, are void and erroneous at common law; and the circumstance that it was found by twelve men is stated in the caption of every indictment according to the

English forms and practice.' But this formality has not been preserved with us, and the omission is not to be objected to in indictments found according to our practice, viz.: 'The jurors for the commonwealth upon their oath present,' etc. An irregularity in this respect, if it should happen, might become a subject of inquiry, upon a suggestion to the court; for under their superintendence the grand jury is constituted, and must be understood to have the legal number of qualified men.

"The last remark of Judge Sewall is much relied on by the Maine court in their opinions. But at what time is this suggestion to be made? When the grand jury is still under the superintendence of the court, or at what time? Can a different court make the inquiry, as was done in this case now before us? Judge Sewall continues thus: 'This being the construction to be given to the record, after an indictment has been received and filed by the court, no averment to the contrary can be permitted as a formal plea. Objections to the personal qualifications of the jurors, or the legality of the returns, are to be made before the indictment is found, and may be received from any person who is under a presentment for any crime whatsoever, or from any person present who may make the objection as *amicus curiæ*.'

"Our law makes all such indictments as are returned into court by the foreman, in the presence of the grand jury, and indorsed by him as 'a true bill,' and filed by the court, records of the court, and records can not be averred against. No matter how much I am disposed to respect the learning and the practical sound sense of the Maine court, I can never consent to do away with our statutory requisitions because that court decided a similar case otherwise than I am warranted in doing.

"The doctrine now laid down by this court can not produce harm; for an innocent person will not be hurt by refusing to go behind the indictment and see how it was found, for he can always vindicate himself in a trial upon the merits. This doctrine, too, violates no law by rendering that public which the law deposits in the breast of a grand juror as an inviolable secret."

So, in *State v. Oxford*, 30 Tex. 428, a plea in abatement was filed at the arraignment, setting forth that the "pretended indictment" returned in the case was returned by mistake, and praying that it be abated; and the court below admitted the testimony of seven of the grand jurors, including the foreman, to show that no such indictment was in fact found; but the appellate court held that this was error, because such a practice was against the policy of the law, and would subject grand jurors to most pernicious influences, and that if it were allowed, trials for murder would seldom occur. The decision was, however, based in part on a provision in the statute to the effect that an indictment might be set aside "if it appeared by the records of the court that it was not found by at least twelve grand jurors," the court holding that, on the principle of *expressio unius, exclusio alterius*, parol proof of such irregularity was inadmissible.

On the other hand it was held in a recent case by the superior court of Buffalo, New York, *People v. Shattuck*, 6 Abb. New Cas. 33, that on a motion to set aside an indictment affidavits of grand jurors were admissible to show that such indictment was never in fact voted on by the grand jury. Sheldon, C. J., delivering the opinion of the court, said:

"The motion was opposed upon the grounds that parol testimony could not be given to impeach the action of the grand jury; that the indictment was a record, and imported absolute verity; and that no member of the grand jury could be sworn to disclose their deliberations. These objections apply to a case where it is sought to impeach the record in some collateral proceeding,

but this is a direct motion before the court in which the record remains to have it set aside as void or erroneous. The accused is protected by the bill of rights, and can not be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury; that grand jury must be a legal grand jury, and the vote of twelve at least of the body must concur in the finding of a bill; otherwise, one can not be found.

“When it is suggested to the court that an irregularity or error in the respect now urged had occurred, it is consistent with the general superintending power and duty of the court that a proper inquiry should be instituted in order that the evil or wrong may be arrested: *Commonwealth v. Smith*, 9 Mass. 110; *Low's case*, 4 Greenl. 439; *People v. Strong*, 1 Abb. Pr. (N. S.) 244. Now of what service would this inquiry be to the accused, or to public justice, unless grand jurors could be called upon and testify as to the vote, the concurrence in which is of so essential and vital importance? The inference from the fact that the grand jury have found and presented an indictment, is that it was so found by at least twelve of the number of that body. It is no state secret, nor is it a part of their counsel, which each member has been sworn not to divulge. If it was, then they could never disclose that an indictment had been found. How each one voted, or what each one said during their deliberations, are matters that can never be disclosed, for upon the inviolable secrecy which the law has imposed as to these particulars depend, in a great degree, the efficiency, and independence, and integrity of the grand inquest. It is of necessity that some grand juror must be called upon to testify as to whether a vote was taken, and the result, else the investigation as to those facts would be futile.”

If any general rule can be safely deduced from these adjudications, it would seem to be this: 1. That such testimony is not admissible in any case or for any purpose, except upon a direct proceeding to set aside the indictment; 2. That it is not admissible even in a direct proceeding where it is offered for the purpose of showing that the indictment was voted for by the grand jurors, or any of them, without evidence, or upon insufficient or incompetent evidence, or to show how any particular grand juror voted, or what opinion he expressed upon the case; 3. That it is admissible in a direct proceeding, to show that the indictment was not in fact voted for by the legal number of grand jurors. Such a rule would appear to afford sufficient protection to the secrecy, and freedom of investigations by the grand jury, and would, on the other hand, save both the court and the accused the time, trouble and expense of a trial upon an indictment returned by mistake or otherwise, when no indictment had in fact been found.

GREELEY v. THURSTON.

[4 GREENLEAF, 479.]

A SUIT ON NEGOTIABLE PAPER MAY BE BROUGHT ON THE DAY IT FALLS DUE, if demand for payment has first been made at a reasonable hour of that day.

TIME WHEN SUIT MAY BE BROUGHT.—Except in the case of negotiable paper, the debtor can not be subjected to an action until after the whole of the day of payment has passed.

ASSUMPSIT by the payees against the maker of certain notes.

The declaration contained two counts: 1. On a note dated April 18, 1825, payable six months after date with grace; 2. On a note dated June 20, 1825, payable four months after date. The writ was issued October 21, 1825, between four and five o'clock p. m., and service was commenced on the next day by attachment of the defendant's goods. Subsequently, the plaintiffs caused the second count to be stricken out of the writ, and issued a new writ on the note mentioned in said count. Service of both writs was completed November 15. The questions submitted to the court were: 1. Whether the action was prematurely brought on the first note; 2. Whether the alteration in the writ avoided it.

Kinsman, for the plaintiffs, contended that the action might properly be brought on the last day of grace: *Castle v. Burditt*, 3 T. R. 623; *Jones v. Fales*, 4 Mass. 251.

Daveis, *contra*, cited *Henry v. Jones*, 8 Mass. 453.

By Court, WESTON, J. Prior to the service of a writ, the plaintiff may change, modify or amend it at his pleasure. Whether, after the service had commenced by attaching the defendant's goods, but prior to its completion, it was competent for the plaintiffs in this case to strike the second count out of their declaration, from the view we have taken of the cause upon other points, need not now be decided.

The note declared on in the first count, dated April 18, 1825, payable in six months with grace, became due on the twenty-first of October following. Was it suable on that day? It is remarkable that no decision directly upon this point has been adduced, nor have we, after considerable research, been able to find one. The treatises of Kyd, Chitty and Bayley, on bills of exchange and notes of hand, have also been examined with a view to this question; but they contain no intimations affording any satisfactory aid in the solution.

The objection on the part of the defendant, the maker of the note, is that he has the whole of the last day in which to pay it, and that until that day is passed, he can not be said to have broken his contract. There is no question, that with regard to bonds, mortgages and instruments in writing, other than notes of hand, or bills of exchange, the party who engaged to pay money, or to perform any other duty, fulfills his contract, if he does so on any part of the day appointed. Unless the case of negotiable paper forms an exception to the general rule which attaches to other written contracts, the maker of a negotiable

note of hand and the acceptor of a bill of exchange, are not liable to be sued until the day after these instruments become due and payable.

In the case of *Lefley v. Mills*, 4 T. R. 170, we have the opinion of Mr. Justice Buller, given in strong terms, although the decision was finally placed upon another ground, that the general rule before intimated, does not apply to bills of exchange. In that case, a clerk called with the bill, upon which the question arose, at the house of the defendant, the acceptor, on the day it became due, and not finding him at home, left word where the bill might be found, that the defendant might send and take it up; this not being done at six o'clock in the evening, it was noted for non-payment. Between seven and eight o'clock the same clerk called on the defendant again with the bill, who then offered to pay the amount of it; but refused to pay an additional half crown demanded for the notary. Lord Kenyon was of opinion, at the trial, that the tender was sufficient; and directed a verdict for the defendant. A rule was obtained to show cause why the verdict should not be set aside, and a new trial granted. The court said, in granting the rule, that the main question was whether the acceptor had the whole day to pay the bill in, or whether it became due on demand at any time on the last day. After argument, Lord Kenyon stated that in this, as in other contracts, the acceptor had the whole day; but said if there were any difference between bills of exchange and other contracts in this respect, the claim for the notary could not be supported; this being an inland bill, payable fourteen days after sight, and the statute of William, which first authorized a protest upon inland bills, giving it only upon such bills as were payable a certain number of days after date. Upon this last ground Buller, J., concurred; but he added: "I can not refrain from expressing my dissent to what has fallen from my lord, respecting the time when the payment of bills of exchange may be enforced. One of the plaintiff's counsel has correctly stated the nature of the acceptor's undertaking, which is to pay the bill on demand, on any part of the third day of grace; and that rule now is so well established, that it will be extremely dangerous to depart from it. With regard to foreign bills of exchange, all the books agree that the protest must be made on the last day of grace; now that supposes a default in payment, for a protest can not exist, unless default be made. But if the party has until the last moment of the day to pay the bill, the protest can not be made on that day. Therefore the

usage on bills of exchange is established; they are payable any time on the last day of grace, on demand, provided that demand be made within reasonable hours. A demand at a very early hour of the day, at two or three o'clock in the morning, would be at an unreasonable hour; but, on the other hand, to say the demand shall be postponed until midnight, would be to establish a rule attended with mischievous consequences."

Upon consideration, we adopt the views of Mr. Justice Buller, and it is our opinion that bills of exchange and negotiable notes should be paid on demand, if made at a reasonable hour, on the day they fall due, and if not then paid, that the acceptor or maker may be sued on that day, and the indorser or drawer also, after notice given, or duly forwarded.

It has been decided in two cases in Massachusetts: *Shed v. Brett*, 1 Pick. 401 [11 Am. Dec. 209], and *City Bank v. Cutter*, 3 Id. 414, that after demand and notice, the indorser may be forthwith sued, without waiting until the expiration of the day on which the note falls due. These cases presented in principle the same question which is now before us. The indorser is collaterally and conditionally liable. It would be a very extraordinary doctrine to hold that he might be sued, before any action could be sustained against the principal and ultimate debtor. If, therefore, an action lies against the indorser under these circumstances, of which we are well satisfied, it must equally lie against the maker or acceptor.

But notes of hand and bills of exchange, like other instruments, are not suable until the day of maturity be passed, unless demanded on that day. The failure to pay on such demand constitutes a breach of the contract and a dishonor of the bill or note, by the usage and custom of merchants. The necessity of a demand on that day, prior to the institution of an action, is clearly deducible from the opinion of Mr. Justice Buller, and from the cases cited, decided in Massachusetts.

In the case before us it does not appear from the statement of facts that the note was demanded of the defendant prior to the commencement of the action; we must therefore decide in accordance with the principles before stated, that it was prematurely brought, and that the plaintiffs must be called.

Plaintiffs nonsuit.

RIGHT TO SUE MAKER ON DAY NOTE IS DUE.—The doctrine here laid down, that an action may be brought against the maker of a note on the last day of grace, after demand and refusal of payment on that day, is well established in Maine and Massachusetts, and in several of the other states: See

the note to *Shed v. Brett*, 11 Am. Dec. 217, where this subject is discussed. The following cases support this view: *Ammidown v. Woodman*, 31 Me. 580; *Pease Bank v. Winn*, 40 Id. 62; *Coleman v. Ewing*, 4 Humph. 241; *Wilson v. Williman*, 1 Nott & McC. 440; *McKenzie v. Durant*, 9 Rich. 61; *Dennie v. Walker*, 7 N. H. 201; *Staples v. Franklin Bank*, 1 Met. 43; S. C., Redf. & Big. Lea. Cas. on Bills and Notes, 480, and note. Other authorities to the same effect are cited in the note to *Shed v. Brett*, 11 Am. Dec. 217, before referred to. But in California and some of the other states the rule is, that the maker has the whole of the last day to make payment, and therefore that an action brought against him on that day is premature: See note to *Shed v. Brett*, 11 Am. Dec. 217, and also the note to *Staples v. Franklin Bank*, Redf. & Big. Lea. Cas. on Bills and Notes, 480. It is so held in *Osborn v. Moncure*, 3 Wend. 170; *Smith v. Aylesworth*, 40 Barb. 104; *Oothout v. Ballard*, 41 Id. 33; *Etheridge v. Ladd*, 44 Id. 69. But it is conceded in the case last cited, as well as in *Osborn v. Moncure*, 3 Wend. 104, that after demand and refusal on the last day of grace, notice may be given to the indorser on the same day, and that such notice will fix his liability.

C A S E S
IN THE
COURT OF APPEALS
OF
MARYLAND.

RUFF'S ADMINISTRATOR v. BULL.

[7 HARRIS & JOHNSON, 14.]

WHEN THE STATUTE OF LIMITATIONS once begins to run, no subsequent disability will stop its operation.

THE STATUTE DOES NOT ATTACH unless there is some person in being competent to sue.

DEBT. The opinion states the case.

Maulsby and Speed, for the appellant, plaintiff below, cited *South Sea Co. v. Wymondsell*, 3 P. Wms. 143; *Bree v. Holbech*, 2 Doug. 656; *Reeves Dom. Rel.* 327, 335, 336; *Cowper v. Scot*, 3 P. Wms. 119; *Cary v. Bertie*, 2 Vern. 342; 4 Bac. Abr., tit. Limitation of Actions, D. 4, 476; *Faw v. Roberdeau*, 3 Cranch, 174.

Mitchell, contra, cited 4 Bac. Abr., tit. Limitation of Actions, E. 4, 479; *Wilcocks v. Huggins*, 2 Str. 907; *Hickman v. Walker*, Willes, 27; *Peck v. Randall's Trustees*, 1 Johns. 165.

By Court, STEPHEN, J. This is an action of debt, instituted by Richard H. Ruff, administrator *de bonis non* of Hannah Ruff, and William Bull, on a single bill, bearing date on the nineteenth of January, 1799, payable on demand. To which action the defendant has pleaded the statute of limitations, that the debt or thing in action had been above twelve years standing before the institution of the suit. To this plea the plaintiff replied that it ought not to be sustained, because Hannah Ruff, the obligee, died the tenth of September, 1801, leaving two children who were minors, and that letters of administration on the estate of Hannah Ruff were granted to Henry Watters on the thirtieth of October, 1801, and that on the twentieth of July,

1805, Henry Watters also departed this life. That on the fourteenth of November, 1810, William Bull, the defendant, was appointed guardian to the minor children of Hannah Ruff, who were entitled to the whole of her personal estate, but that no administration *de bonis non* on her estate after the death of Henry Watters, the first administrator, was granted until the twenty-fifth of August, 1818, when letters were granted to Richard Ruff, the plaintiff in this suit; and that twelve whole years had not elapsed from the date of the bill, or the time it became due, prior to the commencement of this action, if the time is deducted during which there was no administration, from the whole time which has elapsed; and that the defendant ought not to avail himself of the time which elapsed during the time he was guardian to the infant children who were entitled to the money when recovered.

To this replication there was a demurrer; and the question is, whether the demurrer is sustainable in point of law. The single bill upon which the action is founded, bears date the nineteenth of January, 1799, and is payable on demand, and the obligee did not die before the tenth of September, 1801. More than two years elapsed after the cause of action accrued before the death of the party to whom the writing obligatory was given, who might have enforced the payment of the money in her life-time if she had been disposed so to do. In a few weeks after her death letters of administration were granted to Henry Watters, who did not die till 1805. During the period of his administration he also declined the issuing of legal papers, for the recovery of the claim, and no action was brought for that purpose until the present plaintiff was appointed administrator in the year 1818. It then appears that a right of action existed for more than two years, which might have been enforced by Hannah Ruff in her life-time, and that her administrator had the power of compelling payment for a period of more than three years before he died.

The principle of law is indisputable that when the statute of limitations once begins to run nothing will stop or impede its operation. It never does attach unless there be some person in being competent to sue, but when that is the case the legal bar to the recovery of the money will arise, unless legal steps are adopted to enforce the payment within the period prescribed by law. In support of this principle see 4 Bac. Abr. 479; *Doe v. Jones*, 4 T. R. 301; *Peck v. Randall's Trustees*, 1 Johns. 165. Where the general rule is laid down to be that

when the statute of limitations once begins to run, it continues to run, notwithstanding any subsequent disability.

Judgment affirmed.

STATUTE OF LIMITATIONS NOT SUSPENDED BY SUBSEQUENT DISABILITY.—See *Thompson v. Smith*, 10 Am. Dec. 453, and note; *Faysoux v. Prather*, 9 Id. 691; *Demarest v. Wynkoop*, 8 Id. 467; *Jackson v. Moore*, 7 Id. 398; *Fitzhugh v. Anderson*, 3 Id. 625.

EDELEN v. HARDEY'S LESSEE.

[7 HARRIS & JOHNSON, 61.]

EVIDENCE ADMITTED BY CONSENT, in the court below, cannot be objected to on appeal.

A FORMER JUDGMENT against a defendant in ejectment declaring a supposed will invalid, is not a bar to the defendant's offering evidence, in a subsequent ejectment suit, of the legality of the will.

ATTESTATION OF WILL.—It is not essential that a testator should actually see the witnesses attest his will, but it is necessary that he should be in a situation to do so if he desire it.

THE ATTESTATION OF A WILL in a room adjoining that wherein the testator lay, and between which there was a plank partition, is *prima facie* evidence of the illegality of the instrument, although such attestation was at the testator's request, and was subsequently approved by him.

EJECTMENT for an undivided third part of a tract of land called What You Please. Issue joined on the plea of not guilty. The plaintiff claimed as the heir, and the defendant as the devisee of one Thomas Jenkins. Three bills of exception were taken. The first set forth certain evidence read at the trial by consent, from which it appeared that in a former ejectment suit against the present defendant for a certain other parcel of land prosecuted by other parties plaintiff, the will under which the defendant claimed in this action was relied upon and pronounced invalid. The papers and record of the former proceedings were lost, having been destroyed by the public enemy, and the docket entries certified by the clerk were received. The testimony of a juror on the former trial was also heard. He swore that the only fact disputed in that action was the validity of the will; that the evidence then was that the testator signed the will when lying sick, and then asked the witnesses to go into the next room to attest it; that they did so, and went into an adjoining room, through a hall, and signed; that the two rooms were separated by a plank partition and with no direct communication between them. The witness testified that the opinion of the jury was that the testator could not see the witnesses sign their names.

The plaintiff then prayed the opinion of the court that the defendant was precluded in this action from giving evidence of the execution of the will. This opinion, the court, Johnson, C. J., and Key, J., refused to give, saying that this evidence was *prima facie* evidence of the illegality of the will.

The second bill of exception set forth the evidence offered by the defendant of the due execution of the will. A copy of the will was produced regularly executed on its face. It appeared that after the affixing of the testator's signature, he asked the witnesses to attest the will in the next room; that they did so, and the will was immediately carried back to the testator; that it was then read by a clergyman present to the testator, who was informed that the witnesses had subscribed, and that their signatures were shown to him, at which he nodded his head in assent, and said: "Well;" or "Very well." An instruction was asked by the defendant to the effect that it was not essential that the testator should actually see the witnesses sign, but that if he was in a situation to see them affix their signatures, the will was properly executed. The instruction was given. The plaintiff excepted.

The third bill set forth a refusal to instruct the jury that if they believed the evidence adduced, the will was executed in compliance with the statute, and that their verdict should be for the defendant.

Verdict and judgment for the plaintiff.

Magruder, for the appellant.

F. S. Key, *contra*.

By Court, STEPHEN, J. This action of ejectment was instituted in the court below for an undivided third part of a tract of land called What You Please. Defense was taken upon title. The lessor of the plaintiff claiming as heir at law of Thomas Jenkins, and the defendant under an instrument of writing, alleged to be his last will and testament; and the sole question which appears to have arisen in the court below related to the due execution of said will, according to the formalities prescribed by the statute of frauds and perjuries upon this point; three bills of exception appear to have been taken in the court below, only the first and third of which are before this court for their review and adjudication, upon the appeal prosecuted by the appellant. The opinion contained in the second bill of exceptions is not appealed from, and is only before the court by the agreement of the parties, as furnishing the testi-

mony upon which the opinion of the court was prayed, and given in the third bill of exceptions.

The whole of the testimony which went to the jury upon the trial of this case, was admitted by the consent of the parties, and such consent obviates any objection which might otherwise have been made to it, as being exceptionable in point of law. This court are of opinion that the court below did right in refusing the prayer of the plaintiff that the defendant was precluded from giving evidence to prove the due execution of the will. The conclusion of law deduced by the court from the facts so given in evidence that the same were *prima facie* evidence that the will was not legally executed, it is believed by this court to be correct.

It is the opinion of this court that there is no error in the opinion of the court below expressed in the third bill of exceptions, because the evidence, so far from warranting a presumption that the formalities of the law had been complied with, in reference to the executions of last wills and testaments, furnished very strong grounds from which a contrary inference might be drawn. It is true it is not essential that a testator should actually see the witnesses attest his will, but it is necessary that he should be in a situation which would give him the capacity of doing so if he should desire it: *Russell & Lux v. Falls*, 3 Harr. & M. 457 [1 Am. Dec. 380].

Judgment affirmed.

CLOPPER v. UNION BANK OF MARYLAND.

[7 HARRIS & JOHNSON, 92.]

THE EXECUTION OF A MORTGAGE by an indorser to the holder, to secure the payment of a promissory note made for the indorser's accommodation, does not extinguish the note.

NOTE AS PAYMENT.—Where an indorser gives his own note to the holder of a promissory note as security for the debt, the original note is not extinguished unless the last note was received in satisfaction of the first.

GIVING TIME TO THE INDORSER of a note drawn and negotiated for the indorser's accommodation, facts known to the holder will not discharge the maker.

A COVENANT NOT TO SUE generally may be pleaded as a release. But a covenant not to sue for a limited period, can not be pleaded in a creditor's action; the debtor's remedy is an action on the covenant. This latter doctrine does not apply to actions of assumpsit; accordingly, where the holder of a note stipulated not to sue the maker for a specified time, in consideration of a mortgage security given by the indorser, the maker may rely on the covenant, though no party thereto.

ASSUMPT on a promissory note. General issue pleaded. It appeared that the note was one of eight, given by the defendant Clopper for the accommodation of Phillips & Co., and discounted at plaintiffs' bank. Before the maturity of any of these notes, Phillips & Co., who were indorsers, gave to the bank a mortgage of real property as collateral security for them. It also appeared that the indorsers gave their own notes for the amounts of defendant's notes, and that the first of the latter was taken up and canceled by them. Evidence was introduced to prove that Phillips & Co. understood that when they gave their own notes, these should extinguish defendant's notes, although there was no express agreement to that effect. Defendant proved, in addition, that when the mortgage was given, it was expressly stipulated by and between Phillips & Co. and the bank, that Phillips & Co. should not be called upon or required to pay any of the principal sums lent as accommodation for the space of three years from the execution of the mortgage; and further, that no suit should be instituted against Clopper until after the expiration of three years from the date of the mortgage, and that the securing of these advantages was the inducement that led to giving the mortgage. This suit was instituted prior to the expiration of the three years. The defendant then moved the court to instruct the jury that, if they believed that it was agreed that the plaintiffs should not sue the defendant for the space of three years, this suit could not be maintained. This instruction Ward, J., refused to give. The defendant excepted, and the verdict being for the plaintiffs, he appealed.

Williams and R. Johnson, for the appellant. The agreement not to sue Clopper for three years was valid and binding; and, therefore, this suit is premature: *Little v. Holland*, 3 T. R. 590; 4 Stark. Ev. 1050; *Cuff v. Penn*, 1 Mau. & Sel. 21; *Watkins v. Hodges*, 6 Har. & J. 38.

Taney and Kennedy, contra.

By Court, **ARCHER, J.** We do not conceive that by any transactions which have taken place between Phillips & Co. and the Union Bank of Maryland, in relation to the promissory note, which is in this suit the subject of litigation, there has been an extinguishment of the original contract. The mortgage taken by the Union Bank was only for the purpose of securing to that institution the payment of the securities mentioned in it. The parties to that instrument never intended that it should constitute a new debt, nor did it bind Phillips & Co. by any new ob-

ligations; but it was a recognition of the existing liability, and was intended to operate merely as a security for its discharge. It contains an express stipulation that it is to be void upon the payment of the notes, of which Phillips & Co. were the indorsers. The notes given by Phillips & Co. after the execution of the mortgage, would not operate as an extinguishment of the notes drawn by Clopper and indorsed by Phillips & Co., unless they were received by the bank in substitution and in satisfaction of the prior notes. The record contains no evidence from which such an inference would be deducible.

It is urged by the counsel for the appellant, that being only a security for Phillips & Co., and being known to be such by the Union Bank at the date of the mortgage given by Phillips & Co., by which an extension of time was granted to them by such indulgence, he has been discharged from all liability as the drawer of these notes. That in the ordinary case of principal and surety, time given to the principal discharges the surety, is a legal position, as well settled as any other appertaining to the science. But its application to a case of this description may well be questioned. In every bill of exchange the acceptor, and in every promissory note the drawer, is in law the principal, and is first liable, and every indorser in the order in which his name appears on the bill or note. The indorsee may sue all or any of the parties he may choose. He has the entire dominion of the property in the bill, and a perfect right to make any arrangement he pleases with any of them; but he does it at his peril; for if he thereby alter the situation of any other person on the bill to the prejudice of that person, he can not afterwards proceed against him. Therefore, though he may give time to, or discharge, his immediate indorser, he cannot grant indulgence to the drawer or acceptor, and afterwards proceed against the indorser.

The discharge of, or the giving time to, any of the parties liable, does not discharge prior parties, but only those whose names are subsequent to the parties thus discharged, or to whom indulgence is granted. This doctrine is laid down in *Gwynne v. Heaton*, 1 Bro. Ch. 4, in a note by Mr. Eden, and is abundantly supported by the numerous authorities there referred to. Whether the note is one springing out of a consideration actually passing between the parties, or is only an accommodation note, does not seem to make a difference in the law in this respect. It is certain that a contrary doctrine has been held by Lord Ellenborough in the case of *Laxton v. Peat*, 2 Campb.

185. But this decision has, in the English courts, been since uniformly considered a deviation from established principles. Its authority was doubted by Chief Justice Gibbs in *Kerrison v. Cooke*, 3 Campb. 362; and although in his decision in that case he attempts a distinction between it and *Laxton v. Peat*, he does in effect overrule Lord Ellenborough's decision, and he expressed his regret that the term, accommodation bill, ever found its way into the law, or that parties were allowed to get rid of the obligations they profess to contract by putting their names to negotiable securities. Lord Eldon, in *Ex parte Wilson*, 11 Ves. 411, denounces any such distinction as that attempted in *Laxton v. Peat*. In the case of *Fentum v. Pocock*, 5 Taun. 192, the doctrine decided in the case referred to came in review before the judges of the court of common pleas, and it was there expressly overruled, and it was determined that nothing could discharge an acceptor but a release or payment, and that there was no difference between an accommodation acceptance and an acceptance for value.

Indeed, in *Mallet v. Thompson*, 5 Esp. 178, decided five years before the case of *Laxton v. Peat*, Lord Ellenborough made a determination exactly contrary to the case of *Laxton v. Peat*. From this review of the adjudications we can have no hesitation in pronouncing that the case of *Laxton v. Peat* is not law. Courts of justice seemed disposed to consider accommodation notes in the same light, as far as practicable, with notes for value. In this court, in the case of *Wood v. Repold*, 3 Har. & J. 125, it was adjudged that accommodation indorsers, as to their liability to each other, stood precisely in the same relation as did indorsers on notes for value, and that a subsequent indorser paying the amount of the bill was not bound to look only for a contribution upon its payment from his co-indorsers, but that he had a right to recover the whole amount from his prior indorser. They were not held, at all, in the light of co-securities, but each was considered as impliedly engaging to indemnify whosoever should place his name on the instrument subsequently to him. As it regards the principle upon which notice has been required to be given, there does not appear to be any distinction between the different species of notes.

Notice of non-acceptance and non-payment is required to be given that the anterior parties to the bill may take the necessary measures to obtain payment from the parties respectively liable to them; and if notice be not given, it is a presumption

of law that the indorsers and drawers are injured by the omission. And in the application of this principle it is necessary that the courts should inquire into the liabilities of the respective parties to a note or bill, for the purpose of ascertaining whether this injury, either actual or presumptive, could take place. Where a note is drawn for the accommodation of the indorser he is not entitled to notice of non-payment, because the presumption of injury could by no possibility arise, the drawer not being answerable over to him upon his payment. But this inquiry into the situation of the parties, their liabilities, and the circumstances under which it is drawn, is not peculiar to accommodation paper, but is applicable also to other notes. Thus, a drawer, who has no effects in the hands of the drawee, and has no reason to expect the bill would be paid when it became due, is not entitled to notice.

There seems to be a disposition of late, manifested by the courts, to discountenance many of those subtle refinements which, by a kind of judicial legislation, recently crept into the law of bills of exchange and promissory notes, and which have threatened to render it a science of cases merely, and not of principle. That this is the case may be seen by a reference to the opinion of Chief Justice Abbott in *Cory v. Scott*, 3 Barn. & Ald. 619; 5 Serg. & Lowb. 401. When any system of laws is governed by plain and intelligible rules it becomes known to the public, and the interests of a commercial people will thereby be better promoted than by trusting each case to judicial discretion. We do not believe that the appellant was discharged by the time given to Phillips & Co.

It is objected that this suit, having been instituted by the Union Bank in contravention of its agreement with Phillips & Co., not to sue Clopper for three years, has been prematurely brought. It is laid down in 5 Bac. Abr., tit. Release (A. 2), 683, that a covenant perpetual, as that the covenantor will not sue without any limitation of time, is a defeasance or absolute release and is pleadable in bar as such; and a distinction is there taken between such a covenant and one stipulating not to sue for a limited time; and that in the latter case it could not be pleaded in suspension of the action, but the covenantee must seek his redress in an action upon the covenant. Such is the undoubted law in an action of covenant; but we do not find from an examination that it has ever been extended to the action of assumpsit; and we do not feel disposed, by adjudication from analogy, to extend it; for it can not but be admitted

that it is a principle tending to inconvenience and producing circuitry of action.

Besides, we conceive that by giving the agreement the effect of defeating the action until the time of indulgence has expired, a greater certainty of justice will be attained between the parties than by driving the defendant to his action for damages on the agreement. But independent of this view of the case, we may observe that the cause of action here is one which may be sustained under the general count for money had and received; and in such an action the defendant is at liberty to place himself upon such defenses as will show that *ex æquo et bono*, the plaintiff is not entitled to recover. We consider him at liberty, therefore, to give in evidence an agreement granting indulgence, where that agreement is founded on a proper consideration, and from which it would appear to be inequitable to allow the plaintiff, by violating his engagement, to recover. We can not believe that this agreement is void for want of a consideration, for the inducement to its consummation is the mortgage which was entered into by Phillips & Co. to the bank. Whatever might be the force of the objection that this agreement not to sue could have no obligation, its consideration relating to land, and the mortgage containing the stipulation between the parties, it is sufficient to say that it preceded the mortgage and that the testimony does not show whether it is in writing or not. This court can not say it was a verbal agreement for the purpose of invalidating it. If any reliance could have been placed on the fact of its having been merely verbal, it should have so appeared in the bill of exceptions.

We entertain no doubt but that the agreement is valid, and that Clopper may avail himself of it, although made by Phillips & Co. One man may surely make a contract for the benefit of another which will enable that other to institute a suit upon it.

We consider that this suit has been prematurely brought and that, therefore, the judgment of the court below must be reversed.

Judgment reversed.

CONSTRUING A COVENANT not to sue for a limited time for a right resting in contract, the supreme court of Michigan, in *Robinson v. Godfrey*, 2 Mich. 406, came to a different conclusion from that arrived at in the principal case. After a careful consideration of the origin of the doctrine as laid down in *Clopper v. Union Bank* and other decisions, English and American, the court determine that a covenant on the part of a creditor for a valuable consideration not to sue his debtor for a limited time, is not an engagement wholly collateral to the original contract between the parties, for whose breach the only

remedy is by an action therefor, but that it operates directly upon such contract, and will bar an action brought before the stipulated time expires. This opinion expressed upon serious reflection, the court were asked to alter in the subsequent case of *Morgan v. Butterfield*, 2 Mich. 615. So far from changing their former views the court expressly reaffirmed the doctrines stated in *Robinson v. Godfrey*, and supported their position by a further reference to authorities and examination of legal principles.

HENCK v. TODHUNTER.

[7 HARRIS & JOHNSON, 275.]

A WARRANT OF ATTORNEY to authorize the appearance of a defendant by an attorney is not required in Maryland.

APPEARANCE MAY BE IN PROPRIA PERSONA OR BY ATTORNEY.—The entry of appearance by an attorney is presumed to be done by authority; and whatever is done in the progress of the cause by such attorney, binds the defendant.

STRIKING OUT APPEARANCE.—Where an attorney of record applies for permission to have his appearance stricken out, and the same is ordered, the presumption is that it was done by authority of the client. And the latter will not be entitled to a continuance, but will suffer a default if he does not answer anew, according to an order previously made allowing the defendant to withdraw his plea.

APPEAL from the county court. The plaintiffs, appellees, brought assumpsit against Henck as the maker of a promissory note. The cause was continued for two terms; at the third term the defendant's attorney pleaded non-assumpsit. Subsequently, at the same term, the defendant's attorney moved to withdraw his plea. The motion was granted, the court ordering the defendant to answer anew to the declaration. Whereupon defendant's attorney moved that his appearance as attorney be stricken out, and the same was ordered. The defendant not answering, was defaulted, and judgment rendered against him for the amount of the note and interest. From this judgment the defendant appealed.

Mayer, for the appellant, urged: 1. That the court could not strike out an attorney's appearance without the consent of the party: 1 Bac. Abr., tit. Attorney, C. 295; *Anon.*, Siderf. 31; *Latuch v. Pasherante*, 1 Salk. 86; 1 Sellon's Pr. 16, 17; *Bradley v. Breach*, 2 Keble, 275; 2. In any event the defendant should have been notified to appear; 3. If the counsel withdraws during the progress of the cause, the party he represents is presumed not to be in court: *Darnall v. Harrison*, 1 Har. & J. 137; 4. The order directing the filing of a further plea, upon the withdrawal of the first plea, was defective, no time being assigned within which to plead: 1 Sellon's Pr. 300; 2 Harr.

Ent. 99; Tidd's Appendix, 193; Lill. Ent. 473; 5. The judgment by default was not authorized without a warrant of attorney appearing in the proceeding: 1 Sellon's Pr. 17; Jacob's L. D., tit., Judgment, 559.

Mitchell, contra.

By Court, BUCHANAN, C. J. It is not the practice in this state to require a warrant of attorney to authorize the appearance of a defendant by attorney; the rules of practice, therefore, in England, in relation to that subject, are not applicable to the proceedings of the courts of this state. But the party may by the law and practice of the courts of this state appear either in *propria persona* or by attorney; and whenever the appearance of an attorney is entered on the record, it is always considered that it is by the authority of the party; and whatever is done in the progress of the cause by such attorney, is considered done by the party and binding upon him. And whether the attorney is faithful to his trust or not, is a matter between him and the party, his client, to whom he is responsible for the faithful discharge of his duty.

When, therefore, an attorney on the record applies for permission to cause his name to be stricken out, it is presumed to be done at the instance and by the authority of the party for whom his appearance has been entered. But it will never be permitted to a party, or his attorney, to obtain a continuance of a cause beyond the time allowed him by law, by striking out the attorney's appearance at the term at which the cause stands for trial; otherwise, by collusion between client and attorney, the trial of a cause might be delayed without limit. Hence, though the court will, on application, permit the attorney's name to be stricken out, considering him as acting on that very application as the attorney, and at the instance of the party, yet it will not be done to the prejudice of the other party, and the cause will be made to progress as if the appearance had not been stricken out.

In this case, the cause stood regularly for trial, and it must be understood that the permission given by the court to the defendant's counsel to withdraw his plea, was only to give way to another plea without delay, and that the rule then laid to plead over, was virtually a rule to plead *instantly*, otherwise it would have worked a continuance for a cause not justified by law.

Judgment affirmed.

RIGGIN v. PATAPSCO INSURANCE CO.

[7 HARRIS & JOHNSON, 279.]

DEVIATION.—On a policy of marine insurance the underwriters are presumed tacitly to assent to all reasonable efforts on the master's part for the safety of the property insured, and to authorize the usual means of avoiding urgent danger, whether from a peril insured against or not.

IDEM.—There is no distinction between moral and physical necessity in justifying a departure from the voyage insured.

THE INSURED MUST FURNISH A MASTER of competent skill, prudence and discretion; and if a departure from the course of the voyage is the result of employing a master not of that character, the insurers will be discharged.

MERE APPREHENSION OF DANGER, unless founded on reasonable evidence, does not justify a deviation. The peril apprehended must be one that would occasion serious loss or injury; it must be imminent and obvious, not problematical or contingent.

THE FEAR OF CAPTURE at the port of destination, founded on mere rumors that the port had fallen into the hands of the enemy, will not justify a departure from the voyage.

IDEM.—If such apprehended danger would justify a departure, the master should have gone to a port in the direct course of the voyage, and not to one many hundred miles out of the course.

THE QUESTION OF DEVIATION is one of law, where the facts are admitted.

WHERE NO TESTIMONY IS OFFERED of a fact, or the proof is so vague and indefinite that the fact to be proved can not be deduced by any rational inference, the court should instruct the jury that it is not competent for them to find such fact.

A STATEMENT IN A BILL OF EXCEPTIONS that certain facts were "proved," construed to mean that evidence was offered to prove them.

COVENANT on a policy of insurance. Plea, *non infregit conventionem*. The policy was on the schooner Two Brothers, against the usual risks, on a voyage from Baltimore to St. Barts, at and from thence to St. Martha, on the Spanish Main, with the privilege of returning to St. Barts, or using three other ports on the main or in the West Indies. The vessel sailed on the fifth of May, 1821, and arrived at St. Barts on the twenty-eighth. The plaintiffs gave evidence to prove that she was strong and staunch when she sailed on her voyage; that at St. Barts the master and supercargo were informed, and had good reason to apprehend, that St. Martha, which at the time of sailing was in possession of the patriots, had fallen into the hands of the royalist Spaniards, and having learned that on a former occasion this party having obtained possession of the port had used the patriot flag to decoy vessels into the harbor and seize them, and fearing a similar fate, that they sailed to Marguarita, a West India island, to get information, being told

and believing that said port was the best and safest port at which to acquire the information; that learning at Marguarita that St. Martha was still in the possession of the patriots, they proceeded directly on their voyage for that place, and while on the direct course for St. Martha the schooner was wholly lost by the perils of the sea. The defendants introduced evidence to prove that at St. Barts there were rumors of the capture of St. Martha by the royalists; that hearing these, and influenced by these general rumors, the master sailed for Marguarita, a port three hundred miles out of the course of the voyage, to obtain information, when that information might have been obtained at Curacoa, a port much nearer and one generally resorted to by neutrals for intelligence concerning the Spanish Main, and that the Two Brothers was detained three or four days at Marguarita by the officers of that place. The defendants further offered evidence that at Baltimore, prior to sailing, the vessel received on board three or more military officers in the service of the Colombian republic to carry them to St. Martha to join the forces of the republic in that place then at war with Spain, and that the officers were on board when the vessel was lost.

The plaintiffs asked the instruction of the court to the jury that if they believed that upon the arrival of the Two Brothers at St. Barts it was generally reported that St. Martha was in the possession of the royalists, and that the master and supercargo were informed and verily believed that Marguarita was the best place to obtain information, and that they in the exercise of an honest and sound discretion sailed for that place; that then there was no deviation, and the plaintiffs were entitled to recover. This instruction the Court, Archer, C. J., and Ward, J., refused to give. The plaintiffs excepted, and the verdict and judgment being against them, appealed.

Meredith and Mitchell, for the appellants, to justify the departure from the course of the voyage, cited: *Reade v. Commercial Ins. Co.*, 3 Johns. 352 [3 Am. Dec. 495]; *Phillips on Ins.* 192, 194, 195; *Oliver v. Maryland Ins. Co.*, 7 Cranch, 493; *Whitney v. Haven*, 13 Mass. 173; *Patrick v. Ludlow*, 3 Johns. Cas. 10 [2 Am. Dec. 130]; *Hadkinson v. Robinson*, 3 Bos. & P. 388; 1 Park, 262; *Graham v. Commercial Ins. Co.*, 11 Johns. 352; 1 Marsh. 205; *The Santissima Trinidad*, 7 Wheat. 283. To show that the deviation was justifiable, although the risk against which it was intended to guard was not insured, counsel cited: *Lubbock v. Rowcroft*, 5 Esp. 50; *Sallus v. United Ins. Co.*, 15

Johns. 526; *Green v. Elmslie*, Peake's N. P. 212; *Scott v. Thompson*, 4 Bos. & P. 181; *Robinson v. Marine Ins. Co.*, 2 Johns. 89; Phillips on Ins. 214; *United States v. Palmer*, 3 Wheat. 610, 636; *The Divina Pastora*, 4 Id. 52; *Richardson v. Marine Ins. Co.*, 6 Mass. 105 [4 Am. Dec. 92]; *Earle v. Rowcroft*, 8 East, 126; *Barker v. Blakes*, 9 Id. 283; *Bird v. Appleton*, 8 T. R. 562; *Vasse v. Ball*, 2 Dall. 270; 1 Marsh. 203, 415, 436, 439, 449; *Marine Ins. Co. v. Tucker*, 3 Cranch, 357.

Mayer and Purviance, contra. Where a vessel goes out of the course of her voyage to avoid a peril not insured against, the insurers are discharged: *Breed v. Eaton*, 10 Mass. 21; *Rogel v. Thurston*, 2 Johns. Cas. 248; *O'Reilly v. Royal Exchange Ins. Co.*, 4 Campb. 248; *Parkin v. Tunno*, 11 East, 22. The jury are to determine whether it was a well founded apprehension of capture, and whether the master proceeded to the nearest port or not: *Oliver v. Maryland Ins. Co.*, 7 Cranch, 493; Phillips on Ins. 192, 193; 1 Marsh. 195, 204; Park, 264. The deviation must be for the benefit of the parties concerned: 1 Marsh. 205; Phillips on Ins. 235; *Richardson v. Marine Ins. Co.*, 6 Mass. 121 [4 Am. Dec. 92]; *Smith v. Universal Ins. Co.*, 6 Wheat. 176; *Pole v. Fitzgerald*, Willes, 641.

By Court, DORSEY, J. The right to the appellants to recover in this action seems to have been resisted in the court below, simply on the ground that the sailing of the schooner Two Brothers from St. Barts to Marguarita, under the circumstances of the case, was a deviation by which the underwriters were discharged from all liability on the policy. But the appellees here contend that the judgment rendered is correct for various reasons: 1. They insist that every deviation to avoid a peril not insured against absolves the assurers.

To examine this point independently of decisions on the subject, the court think it stands relieved from all difficulty or doubt. In construing a policy of insurance, the court should give it a fair and liberal interpretation, such as under all the circumstances of the case, appears most consonant to the intention of the parties at the time the contract was formed. The design of the assured being to provide for themselves an indemnity against loss, from which the insurers engage to protect them, such a construction should be placed on their compact as, according to the understanding of the parties, and nature of the transaction, will effectuate that object. Mercantile negotiations should never depend on subtleties and niceties, but upon rules

founded on common sense and justice, a knowledge of which would therefore be readily acquired by the community at large. Policies of insurance may be considered either as universal, embracing all manner of risks, or special, being confined to one or more specified perils. On the latter description of policies only can the question now under consideration ever arise.

As to all risks not insured against, the owner becomes his own underwriter; when an insurer assumes a responsibility for all losses, for example, arising from sea risks only, can it be presumed to be the understanding or agreement of the parties to the policy that the insured relinquished all right to escape capture from pirates, or elude other imminent peril by flying for protection to a neighboring port out of the usual course of the voyage. If such be the operation of a contract of insurance, not universal, instead of providing for the insured an indemnity against loss, it serves but to paralyze his efforts for the safety of his property, and to impose on him new duties and restrictions which enhance his dangers. "A deviation is a voluntary departure, without necessity or reasonable cause from the regular and usual course of the voyage." How can that digression from the cause of the voyage be said to be "without necessity or reasonable cause," which is made to avoid an imminent peril of capture or other disaster necessarily resulting in the entire loss of the subject-matter of insurance? If not, then such a departure being no deviation, is justifiable, and impairs not the liabilities of the underwriters.

Suppose the common case of a general ship, where the cargo is owned by many different persons, each of whom insured against separate risks; upon the occurrence of peril insured against by any one owner, the captain becomes the joint agent of such owner and his underwriter, and is in duty bound to avoid the danger even by a digression from the course of the voyage; and yet, in such a case, if the doctrine contended for be correct, all the underwriters upon other parts of the cargo would be absolved from their engagements, in manifest violation of the intentions of all the parties, and contrary to every idea of common sense and justice. The court think the insurer must be presumed to be acquainted with the usages and incidents to which the property insured may be subjected in the course of the voyage; that they are contemplated by him at the time of his contract, enter into and become a part of it, and that although he is only answerable for losses flowing immediately from the perils against which he insures, yet that viewing the captain as

the agent of the owner, he tacitly assents to all reasonable efforts which he may make for the safety of the property insured, and its transportation to the port of destination; and consequently authorizes the usual means of avoiding urgent danger, whether it be from a peril insured against or not.

This being the view which we have taken of this point in the cause, independently of all adjudications on the subject, let us examine how far they should prompt us to a change of opinion. Between cases of physical and moral necessity, as justifications for departure from the course of the voyage, the books make no distinction, and in reason and principle there is none. In support of the principle for which they contend, the counsel for the appellees have referred to three cases, one of which is *Breed and others v. Eaton*, 10 Mass. 21. The policy was signed at Boston, in December, 1810, on a voyage from Liverpool to Savannah; the vessel arrived off the port of destination on the twenty-fifth of February, 1811, but being informed of the non-intercourse law passed by the congress of the United States, the captain, afraid to enter, and apprehending seizure and confiscation, to avoid it, sailed to Amelia island, to wait until he might lawfully return to Savannah. The underwriter being sued on this policy for a subsequent loss, their counsel insisted that they were discharged by the deviation, in going to Amelia island to avoid a risk not covered by the contract of insurance; and also that the policy became void in consequence of the non-intercourse law of the United States; "and of this opinion (says the reporter) were the court."

Of what opinion? Whether that the deviation avoided the policy, or that it became void under the non-intercourse law of the United States, we are left to conjecture. But from the manner in which the last position was presented to the court, being deemed too plain to require either argument or authority to support it, and from the promptness and brevity with which their judgment was announced as soon as the last point in the cause was started, it affords a very strong presumption that upon that only did they bottom their decision. It was not the habit of that enlightened tribunal to decide in a way so summary and laconic, so grave and important a question as that discussed on the principle of deviation, and on which contrary determinations had taken place. We are aware, however, that in Phillips on Insurance, 211, this case is classed as though it turned on the point of deviation.

The other two cases are *Roget v. Thurston*, 2 Johns. Cas. 248;

and *O'Reilly v. The Royal Assurance Co.*, 4 Camp. N. P. Rep. 246, both of which do sanction this novel and technical distinction relied on by the appellees. But *Roget v. Thurston*, is in fact overruled by a subsequent decision of the same tribunal, in which Chief Justice Kent, with Judges Tompkins, Spencer and Thompson, concurring, decides that "a deviation from necessity will excuse the assured, in case of an insurance against any particular risk, as well as in case of a general insurance. There is not probably any exception to be met with to the application of the general principle that if the vessel departs from the usual course of the voyage, from necessity and departs no further than that necessity requires, the voyage will still be protected by the policy:" *Vide Robinson and Robinson v. The Marine Insurance Co.*, 2 Johns. 89. In this case, the insurance being against "sea risks only," and a digression *quia timet*, a peril not insured against, the court adjudged it no deviation. The appellees then can only sustain their position by the single *nisi prius* decision of Chief Justice Gibbs, in 4 Camp., in opposition to which is the positive decision of Lord Kenyon, in *Green v. Elmslie*, Peake N. P. 212, which is approved of and adopted by Lord Ellenborough in *Live v. Janson*, 12 East, 653; and the deliberate opinion of the court of common pleas, delivered by Chief Justice Mansfield, after full argument, in *Scott v. Thompson*, 4 Bos. & P. 181. In Marshall on Insurance, 204, it is stated, that "necessity will justify a deviation, though it proceed from a cause not insured against." And the same principle is supported by Phillips on Insurance, 214.

The weight of authority, this court conceives, is decidedly in favor of the views they have taken of the case at bar; and in all questions of this sort, we apprehend the doctrine laid down in *Stocker et al. v. Harris*, 3 Mass. 417, stands free from the objection that "the captain is the common agent of the concerned, and it is his duty to manage their distinct and separate, as well as their joint interests, according to his best judgment; and whatever is fairly done with this purpose, is within the course of the voyage; and delays occasioned by such events are accidents to which the insurers are accidentally, if not directly subjected." "Fairly done," being understood to mean done with good intentions and upon reasonable grounds. But admitting the law to be otherwise, there is nothing in the bill of exceptions to show that the peril sought to be avoided was one excepted out of the policy. It does not even appear that the Two Brothers had any cargo on board, or that there could have

been the most remote cause or apprehension of danger, "by reason or on account of any illicit or prohibited trade or trades in articles contraband of war."

The appellees next object that the appellants having prayed an hypothetical instruction from the court that they were entitled to recover, if the jury believed certain enumerated facts, the effect of granting such a prayer would be to withdraw from the hands of the jury the finding of all other facts than those specified, and would in truth be a direction that if the jury should find the facts enumerated to be true, although they might disbelieve every other fact on which testimony had been offered, yet that the plaintiffs are entitled to recover. If such would be the operation of the instruction prayed for, it surely can not be contended that its refusal is matter of error, as all evidence of peril, or apprehension of peril is excluded from the consideration of the jury, it not being one of the enumerated facts, on the finding of which their verdict is made exclusively to rest. The departure from the course of the voyage being then without apology or justification, the law affixes to it the character and consequences of deviation. Whether this be the true construction of the appellant's prayer is not clear of doubt, and we deem it unnecessary to express any opinion on the subject.

The appellees also insist that the testimony offered in this cause does not disclose any justification for the sailing of the schooner from St. Barts to Marguarita, and that on account of this deviation they are discharged from their policy. And in this we concur with them in opinion. In every contract of marine insurance the law imposes an obligation on the assured to provide a master of competent skill, prudence and discretion, to navigate the vessel; and if in a change of the course of the voyage a loss happens, which may be justly imputed to his not having provided a master of that character, the underwriters are not responsible. The mere apprehension of danger, unless founded on reasonable evidence, does not justify deviation. The court, and not the jury, are the judges whether the deviation be justifiable: *Oliver v. Maryland Insurance Company*, 7 Cranch, 493-495; and *Patrick v. Ludlow*, 3 Johns. Cas. 13 [2 Am. Dec. 130]. The peril apprehended must be such that if encountered, loss, or serious injury is the necessary consequence. The danger must be imminent and obvious, not problematical or contingent. Apply these principles to the evidence offered in the case at bar. Upon their arrival at St. Barts, the captain and supercargo "are

informed, and had good reason to apprehend, that St. Martha, which, at the time of the sailing from Baltimore, was in possession of the patriots, had fallen into the hands of the royalists, who had, by keeping the patriot flag flying, decoyed vessels into port, and seized, detained and confiscated them."

Do these facts constitute an "obvious" or "imminent" danger. Is it alleged that on such former occasion, American, or neutral vessels were decoyed into port, seized and confiscated? Not a word of the kind. And this court are not permitted by mere implication, in the absence of all proof, to impute to the agents of a sovereign and christian nation, such acts of lawless outrage and treacherous rapine. The hoisting of the patriot flag by the captors of St. Martha, can only be viewed as a *ruse de guerre* to operate on the vessels of the patriots, not of neutrals. There appears, therefore, to have been no cause for the apprehension of such danger as would justify the sailing from St. Barts to Marguarita. Even suppose that neutral vessels had shared the same fate at St. Martha, on the occasion alluded to, with those of the patriots, there is no evidence to show that the recaptor of St. Martha was the same perfidious royalist robber, into whose hands it had formerly fallen. And there is a total absence of testimony on which to ground an inference, that a similar system of plunder had been practiced in recaptured ports by other royalist commanders. On these grounds the court below were right in refusing to grant the plaintiff's prayer that they were entitled to recover.

Their opinion, it is apprehended, may be supported on another ground. "The circumstances that a deviation takes place through the mistake or negligence of the captain, does not prevent its discharging the underwriters, since his mistakes and negligence are at the risk of the assured:" See *Phil. Ins.* 223, and *Phyn and others v. The Royal Exchange Assurance Co.*, 7 T. R. 505. The captain is bound to know as far as the ordinary means of information can afford such knowledge, the various ports in the course of his voyage, as well as regards their locality, as the general nature of their trade, and the relief and assistance he may expect to obtain, should he be compelled to visit them on account of any emergency arising in the prosecution of the voyage. A failure on the part of the captain to possess such information is a violation of the implied engagement always imposed on the assured, that the vessel, in relation to which the insurance may be effected, is navigated by an officer of competent skill and judgment for the performance of the voyage.

According to the testimony offered by the defendants, Curacao is in the direct route of the voyage from St. Barts to St. Martha, is an open port, free for the reception of Spanish and Colombian vessels of war, and for the vessels of all other nations, and that constant intercourse is kept up between Curacao and St. Martha, and that information, in relation to the last mentioned port, would be heard at Curacao in the course of three or four days, that being the usual length of the voyage between those places; and that Curacao was resorted to by neutrals for intelligence, as to the state of the Spanish Main; that Curacao is a place of deposit or *entrepot* for large quantities of merchandise, which are intended to be carried to the different ports on the Spanish Main, and which are, from time to time, placed there and removed according to the state of the market, and the situation of the ports on the main, whether in possession of the royalists or independents; and that these facts, in relation to Curacao, were well known in Baltimore, previous to and at the time of the sailing of said vessel on the voyage insured; and that it was well known at St. Barts that Curacao was the nearest place to St. Martha, where correct information was at all times to be obtained of the state and condition of the government of St. Martha; that Marguarita is six hundred miles from St. Martha, whilst Curacao is but three hundred, and that Marguarita is by one third more distant from St. Barts than Curacao. That Marguarita is much out of the usual track of a voyage from St. Barts to St. Martha, and was never pursued by a vessel having St. Martha in view as her port of immediate destination.

In justification of the conduct of the captain, without proving that Marguarita was a port of more convenient access than Curacao, was likely to possess the means of giving the information sought for, or for a like purpose, was ever visited by any vessel on any voyage, it is proved that the captain "learning at St. Barts that Marguarita, a West India island, was the best and safest port or place at which to acquire information relative to the situation of St. Martha, proceeded there." How, or from what source the captain gained this intelligence, does not appear. Of the facts detailed in relation to Curacao, he was bound to have had knowledge. If so, can it be doubted that it was his duty to have sought the intelligence he desired at the port of Curacao, the nearest and most convenient port, and that by proceeding to Marguarita, he committed a deviation which discharged the underwriters?

But the court was justified on another ground in refusing the

plaintiffs' prayer. They could only grant it, provided that from the whole testimony offered in the case, the jury were warranted in finding the facts specially enumerated therein, and all other facts necessary to support the action, notwithstanding it be admitted that all the evidence offered by the defendants is true, (except so far as the same may be contradicted by the finding of the specific facts contained in the prayer), no matter how strong may be the contradictory testimony produced by the plaintiffs. Upon any other principle the court would have transcended the limits prescribed to their powers, and invaded the undeniable and exclusive prerogative of the jury, viz.: The right of deciding on all matters of fact, as to which contradictory evidence may be adduced. What is the instruction prayed? That the court direct the jury "that if they should believe that upon the arrival of the vessel insured at St. Barts it was generally reported that St. Martha was in possession of the royalists, and that the master and supercargo were informed at St. Barts, and verily believed, that Marguarita was the best and nearest place to obtain information relative to the situation of St. Martha, and that the master of said vessel, in the exercise of an honest and sound discretion, went to Marguarita for information, that proceeding thereto was no deviation, and that the plaintiffs were entitled to recover for a total loss."

How could the court authorize the jury to find the fact that Marguarita was the nearest port to obtain information relative to the situation of St. Martha, without one particle of testimony on the part of the plaintiffs to establish that fact, and in opposition to its conclusive refutation by positive proof adduced by the defendants. We conceive it to be the peculiar duty of courts of original jurisdiction, imposed on them for the wisest and best purposes, when applied to, in cases where either no testimony is offered of a fact, or the proof is so vague and indefinite that by no rational inference can the fact attempted to be proved be deduced, to instruct the jury that from the testimony offered it is not competent for them to find such a fact. The inconsistency of the court, therefore, would have been most conspicuous had they by express instruction encouraged the jury to find Marguarita the nearest port, not only without proof, but against that of the most clear and unequivocal character.

The court were right in rejecting the prayer for another reason. The facts being admitted, the question of deviation is a matter of law for the decision of the court. Considering then the testimony in the cause in the way in which it is before

stated, the court were bound to receive it in reference to this prayer. Is it possible that any court of judicature (let the intentions of the captain have been never so honest) would instruct a jury that, under the circumstances of this case, whilst impelled by no imminent peril, but proceeding merely to inquire into the truth of a public rumor, they were authorized to find that in going to Marguarita, instead of Curacoa, he acted in the exercise of "a sound discretion"? We think not. His conduct must be imputed to that gross negligence and want of judgment which discharges the underwriters.

Much stress was laid, in the argument, on the statement in the bill of exceptions, that the plaintiffs "proved" such and such facts. We receive it as meaning nothing more than that he offered evidence thereof.

BUCHANAN, C. J., dissented.

Judgment affirmed.

EICHELBERGER v. FINLEY.

[7 HARRIS & JOHNSON, 381.]

NOTICE OF NON-ACCEPTANCE IS EXCUSED where the drawer has no effects in the hands of the drawee at the time presentment should be made, or having such effects, withdraws them before presentment is made.

IN SUCH A CASE there is no distinction between a non-acceptance and a non-payment, in regard to giving notice.

THE DRAWER OF A CHECK on a bank, where he has no funds, is not entitled to notice of non-payment, nor is he discharged by the failure to present within a reasonable time.

DIFFERENCE BETWEEN DRAWING on an individual and on a bank suggested, where the drawee has no funds of the drawer in his hands.

ASSUMPT for work and labor, goods, wares, etc., money laid out, etc., and on an *insimul computassent*. General issue pleaded. The plaintiffs gave in evidence two checks drawn on the Commercial Bank by the defendants, payable to bearer. From the testimony introduced it appeared that the plaintiffs were the legal holders of the checks; that at the time they were drawn, the defendants did not have funds in the bank sufficient to pay them, and that before they were presented, what funds were there were appropriated by the bank in satisfaction of a debt due it from the defendants. No notice of non-payment was given until three months after the date of the checks, on the day when they were presented. It was admitted that the bank was at all times solvent. The plaintiffs gave in evidence

that it was the usage among banks not to pay checks, unless the drawer had sufficient funds therefor on deposit.

The defendants moved the court to instruct the jury that the plaintiffs were not entitled to recover, which the court, Archer, C. J., refused to do. The defendants excepted, and the verdict being against them, appealed.

R. Johnson, for the appellant. The neglect to present the checks within a reasonable time, and give notice of their non-payment, discharged the drawers: *Chitty on Bills*, 24, 280, 282; *Rickford v. Ridge*, 2 Campb. 537. The presentation was not made within a reasonable time; and the want of funds was not an excuse therefor: *Bickerdike v. Bollman*, 1 T. R. 405; *Walwyn v. St Quintin*, 1 Bos. & P. 654; *Legge v. Thorpe*, 12 East, 175; *Clegg v. Cotton*, 3 Bos. & P. 241; *Thackery v. Blackett*, 3 Campb. 64; *Blackhan v. Doren*, 2 Id. 503. *Chitty on Bills*, 215, 223; *Orr v. Maginnis*, 7 East, 359; *Dennis v. Morrice*, 3 Esp. 158; *Clopper v. Union Bank of Maryland*, 7 Har. & J. 92 [*ante*, 294].

Gill, contra.

By Court, DORSEY, J. Were the appellees, under all the circumstances of this case, bound to use reasonable diligence in demanding payment, and in giving notice to the defendant of the dishonor of his checks, are the only questions submitted to the consideration of the court. It is not pretended that a failure to do so has subjected him to loss or inconvenience. "The reason," says Chitty, in his treatise on Bills of Exchange, "why the law requires the holder to give due notice of non-acceptance by the drawee is that the anterior parties to the bill may respectively take the necessary measures to obtain payment from the parties respectively liable to them; and if notice be not given it is a presumption of law that the drawer and indorsers are prejudiced by the omission." The requisition of notice of non-payment rests on precisely the same principle.

On this simple, and once universal rule, an innovation was made by the decision in *Bickerdike v. Bollman*, 1 T. R. 405, which, with the most of the distinguished judges of England, since that period, has been a theme of regret; and in their zeal to limit the operation of the exception there introduced within the smallest practicable compass, they have explained and frittered it away, until there is but little of it left; and the reasons upon which, in their decisions, they have made that little to depend, are so various, inconsistent and unsatisfactory, that it is a task of no inconsiderable difficulty to extract from them any certain

rule of law, by which this class of cases may be readily distinguished. The rule Justice Buller professed to establish in *Bickerdike v. Bollman*, was that notice to the drawer was not necessary "if it be proved on the part of the plaintiff that from the time the bill was drawn till the time it became due the drawee never had any effects of the drawer in his hands." The reason of the rule, as there stated by the learned judge, was that the drawer could not be injured by the want of notice. In *Clegg and another v. Cotton*, 3 Bos. & P. 239, the rule dispensing with notice is stated to be founded on the fraud of the drawer in drawing without effects; and the same position is also advanced by Justice Ashurst, in *Bickerdike v. Bollman*.

But the fallacy of this doctrine (if authority be necessary to show it) is fully established by the cases of *Legge v. Thorpe*, 12 East, 170, and *Claridge v. Dalton*, 4 Mau. & Sel. 226, where the conduct of the defendants is free from the slightest imputation of fraud. The true rationale of the rule in *Bickerdike v. Bollman*, is that given by Justice Buller, "that the drawer could not be injured by the want of notice." Why not injured by the want of notice? Because the object of notice is to let the drawer know that his bill has been dishonored, and this he already knew from the nature of the circumstances connected with it. To require a party to be notified of a fact of which he has already a perfect knowledge, does appear to be a solecism, not at all in harmony with that beautiful system of reasoning and good sense which pervades every branch of legal science. The many distinguished judges who have disapproved of this rule in expressing their regrets at its introduction, correctly state it to be "the substitution of knowledge for notice," and yet when called upon to apply the principle to the facts in each particular case, such has been the anxiety to limit the extent of its application; such the desire to engraft upon it restrictions and discriminations, by which future cases may evade its operation, that in subtleties and refinements the essence and meaning of the rule has been almost wholly lost sight of.

Of this, the case of *Orr and others v. Maginnis*, 7 East, 359, is a memorable illustration. There a captain in the African trade in January, 1802, in Demerara, drew a bill of exchange upon Messrs. Mullian, Lennox & Co., of Liverpool, for one hundred and seventy-two pounds, eighteen shillings and one penny, payable at ninety days sight to the plaintiffs or order, at which time the drawer had effects, but to what amount does not appear in the hands of the drawees; but in May, 1802, his whole balance,

amounting to the sum of one hundred and sixteen pounds, was paid to him by them, they having no notice of this bill; and from July, 1802, when it was presented for acceptance up to the twenty-second of October, 1802, when it was presented for payment and refused, the drawees had no effects of the drawer in their hands. No notice of non-acceptance was given to the drawer, he not being then to be found, having no settled place of residence, and for want of such notice the plaintiffs were nonsuited at the trial. A motion for a new trial was overruled by the court of king's bench, and Lord Ellenborough, in delivering their opinion, bottoms the refusal on the ground that the drawer had effects in the hands of the drawees at the time the bill was drawn. If a case can be imagined in which a want of effects, with a knowledge in the drawer that his bill would be dishonored, dispenses with notice, it might well be supposed that this case was that case. It does not appear that the drawer at the time the bill was drawn, before or subsequently, ever had credit with the drawees for one farthing more than the amount of the effects in hand. Having then withdrawn the only fund which could sustain the honor of his bill, did he not know by anticipation the fact of its non-acceptance.

The knowledge of the drawer, which is deemed a substitute for notice, does not depend upon that state of things which exists at the time the bill is drawn, but which exists at the time it should be presented. It matters not, therefore, whether the drawer have effects with the drawee when the bill is drawn or not, nor whether he then have any reasonable grounds to expect that his draft will be accepted. Even if the drawer, contemplating a fraud, should at the time of the drawing, have no effects in the drawee's hands, and should not expect to have any at any period thereafter, or that his bill would be honored; yet, if before presentment, repenting of his conduct, he should place adequate funds with the drawee, can it be doubted that he would be entitled to notice? And, *e converso*, if a drawer, having ample effects in the drawee's hands at the time of drawing, and confidently expecting that his bill would be honored, should, before presentment, fraudulently withdraw them from the drawee, abandoning all expectation of the honor of his bill, can it be denied that he would not be entitled to notice? And why? Because the knowledge, which is imputed to him, is that which he possessed at the time of the presentment, not of drawing.

Upon reasoning and on principle, therefore, the true rule ap-

plicable to cases of this kind appears to be, that notice is dispensed with where the drawer, at the time when presentment should be made, had no effects in the hands of the drawee, or having such effects, should withdraw them before presentment is made, and in neither case should have any reasonable grounds to expect that his bill would be honored. It must be admitted that the doctrine here advanced is somewhat at variance with the opinion of the supreme court of the United States, delivered by Chief Justice Marshall, in *French's Ex'rs v. The Bank of Columbia*, 4 Cranch, 157, in which it is stated that it cannot be said "that actual notice is useless, and the want of it can do him, the drawer, no injury;" for this is only true when at the time of drawing, the drawer has no reason to expect that his bill will be paid. The case then has been treated as if it had arisen on a refusal to accept, when in truth it arises on a refusal to pay; but as far as concerns the matters here in controversy, the principles regulating both cases can not be distinguished.

The same rule having been adopted in practice in this state, and sanctioned by courts of justice, as that recognized in *Bickerdike v. Bollman*, under the circumstance of this case, is such knowledge of the non-payment of his checks to be imputed to the appellee, as supersedes the necessity of actual notice? On this subject the court, looking, as they must do, only to the facts in the record, entertain not the shadow of a doubt that he knew, when he drew the checks, that they would be dishonored, and never, at any subsequent period, had reason to expect that they would be paid by the bank, and can not, therefore, set up as a defense the want of notice. The case of *Orr and others v. Maginnis*, 7 East, 359; and *Thackray v. Blackett*, 3 Campb. 164, have been urged by his counsel as conclusive in his favor. But it is conceived that, waiving all exceptions to the soundness of those decisions, they bear no application to the case now under consideration. They were made on transactions between individual correspondents, who may have had a mutual confidence and credit, and were perfectly competent to honor each other's bills, drawn either with or without effects. Not so as to the officers of the public banking institutions in this state. With them the customers of the bank have no accommodation credit, and without a gross violation of their trust, they can honor no check or draft drawn upon them beyond the amount of deposits standing to the credit of him by whom such check or draft may be drawn.

It has been objected that the failure to present the checks

for payment within a reasonable time has discharged the drawers. But there is nothing in this objection. If demand had been duly made, and payment refused, he was not entitled to notice thereof. It was an act, therefore, the omission or performance of which, as to him, was wholly immaterial.

Judgment affirmed.

NEWSON *v.* DOUGLASS.

[7 HARRIS & JOHNSON, 417.]

POLICY "FOR WHOM IT MIGHT CONCERN."—In an action to recover the amount of an insurance received on a policy effected in the defendant's name, "for whom it might concern," the defendant may give in evidence letters from a third person to him, on whose behalf he acted as agent in procuring the insurance.

BY "WHOM IT MAY CONCERN," in a policy, is meant not any and everybody who may chance to have an interest in the thing insured, but such only as are in the contemplation of the contract.

THE ABSENCE OF THIS GENERAL CLAUSE and phrases of similar import, entitle only those to recover on a policy who are named therein, or for whose benefit it is expressed to be made.

UNDER THIS CLAUSE, a party interested, and for whose benefit the policy was effected, by subsequent adoption thereof, may recover, equally as in case of a prior order for an insurance.

THE AGENT OF A FRAUDULENT VENDOR of goods can not set up the fraud in an action by the fraudulent vendee to recover the property.

THE CERTIFICATES OF THE MASTER of the expenses incurred by an agent upon the vessel, are not admissible in an action by the principal against the agent; the master should be produced.

INTEREST IS RECOVERABLE AS OF RIGHT in cases of bonds, written contracts for the payment of money, contracts for the payment of interest, and where the money claimed has been actually used. With these exceptions the practice is to leave the question to the jury.

APPELLANT WAS ALLOWED TO DISMISS his appeal after the delivery of the opinion, and before judgment.

ASSUMPSIT. Plea, the general issue. The action was brought by Newson, the administrator of Colt, to recover from Douglass the amount paid to him as insurance on the ship Mohawk. Douglass had effected the insurance in his own name, "for whom it might concern," and was at the time agent of one Kane, who subsequently sold the ship to plaintiff's intestate. The points made by the bills of exception taken in the course of the trial appear from the opinion of this court, before whom the cause came on cross-appeals.

Kennedy, R. Johnson, Mitchell, for Newson.

Meredith and Wirt, Attorney-general for the United States, for Douglass.

By Court, BUCHANAN, C. J. These are cross-appeals from the Baltimore county court in a suit originally instituted by Roswell L. Colt, administrator of Samuel Newson, against George Douglass, to recover the amount received by him on account of certain insurances effected on the ship Mohawk, and are presented to this court on four bills of exceptions taken at the trial; the three first on the part of the plaintiff below, and the fourth on the part of the defendant. The two appeals having been discussed together before this court, they will be considered as if they were consolidated and formed but one case, and the parties treated as plaintiff and defendant. And the admissibility in evidence of the letters from Archibald Kane to Douglass, which are introduced into the fourth bill of exceptions, constituting also the subject of the first exception; the first and fourth exceptions will be examined in connection.

The admissibility of these letters is resisted for different reasons: first, on the ground that Kane, if living, could not have been received as a witness to sustain the issue on the part of the defendant, by proving that the property in the ship was his, and that he directed the insurance for his own benefit, and that his declarations, whether oral or in writing, are not competent for the purpose of establishing what he himself could not have been permitted to prove. The answer to which is that however true as a general proposition, it is not applicable to this case. The letters of Kane were not offered or admitted in evidence as his mere declarations, or with a view of proving property in him at the time insurances were effected, but for the purpose only, as is stated in the bill of exceptions, of showing by what authority Douglass, the defendant, procured the insurances to be made, and that he acted as the agent of Kane in these transactions, without affecting any question of property or right in Kane to the vessel insured; and it is very clear that that which is not evidence for one purpose may be for another, and when offered to prove that for which it is competent, must, for that purpose, be received.

Kane might, without any insurable interest in the vessel, have caused her to be insured, and have constituted the defendant his agent for that purpose, which fact of agency, unconnected with the question of property or insurable interest, the defendant was competent to prove by the best evidence the nature of the case would admit of, and that best evidence was the correspondence, authorizing and directing the insurance. The agency of the defendant was a fact connected with the matter in con-

troverſy, but in no otherwiſe affecting the plaintiff than as the exiſtence of that fact affected the nature of the tranſaction which gave birth to the ſuit, and not as concluding the rights of the plaintiff or eſtabliſhing the intereſt of Kane. It is not underſtood as being denied that the defendant might have been permitted to prove that in effecting the inſurances he acted as the agent of Kane; and how elſe ſhould that agency have been proved than by the production of the letters themſelves, by which it was created. If they were not letters authorizing and directing inſurance to be effected, but merely reciting or ſpeaking of a pre-exiſting agency, and depending for their effect on the credit of Kane, the objection would have aſſumed a different character; but as it is, the firſt ground of exception can not be ſuſtained. And looking to the caſes of inſurance reported in the books it will be found to be the common, the every-day practice to admit ſuch testimony for the purpoſe for which it was offered and received in this caſe. And beſides, that it is not opposed to any ſettled rule of evidence, the very nature of ſuch tranſactions requires it; it is eſſential to the great operations of commerce between the different and remote ſections of the world, which are, and muſt, to a great extent, be carried on through an epiſtolary medium.

But it is ſuppoſed that the general terms of the policies of inſurance of “George Douglaſs, for account of whom it may concern,” etc., mean any and everybody having an intereſt in the thing inſured; and with that underſtanding of the policies it is further contended that theſe letters (ſhowing that the inſurances were procured under authority derived from Kane) were inadmiſſible as tending to contradict the policies, which on the face of them are for the benefit of all who may have any intereſt in the ſhip, by ſhowing that they were effected for the benefit of Kane alone. If that were admitted to be the true meaning of the terms of the policy, it would by no means follow that the objection to the admiſſibility of the letters ariſing merely out of that conſtruction could be ſuſtained. They were not uſed for the purpoſe of proving any intereſt or property in Kane; but if they had been and were free from other objections, what was there to exclude evidence of property in him, and that he was the only perſon concerned in intereſt in the inſurances? The policies being “for account of whom it might concern,” evidence of who was in fact concerned could not ſurely be contradictory to the policies. On what principle does the plaintiff ſeek to recover from the defendant the amount in-

sured, other than that the ship belonged to Samuel Newson, his intestate at the time of his death, and that the insurances were for the sole benefit of his representatives? And if evidence that the insurances were obtained for the benefit of Kane was inadmissible as being contradictory to the terms of the policies, on what ground could proof be received that they were effected for the benefit of Newson's representatives?

But "whom it may concern" is a technical phrase common to policies of insurance, and is understood to mean not any and everybody who may chance to have an interest in the thing insured, but such only as are in the contemplation of the contract. Such a policy supposes an agency, and proceeding upon that ground looks only to the principal in whose behalf or on whose account the agent moves in the transaction; and he for whose benefit the insurance is procured is the person in the contemplation of the contract—is he whom it alone concerns. The inquiry, therefore, in such cases, always is for whose benefit, on whose account, was the insurance obtained, and that not appearing upon the face of the instrument is a proper subject of extrinsic evidence which comes in aid of the policy by pointing out the person to whom it is applicable, the party who is in fact concerned. And this is not confined to policies of insurance, but in the application of every instrument of writing evidence *aliunde* is necessarily used to designate the proper subject-matter to which it relates. The letters of Kane, therefore, were properly admitted in evidence for the purpose of showing that the defendant effected the insurances as his agent and under authority derived from him, which disposes of the first exception, leaving the question of property in the ship, and the intention of Kane, at the time of directing her to be insured, to the effect and operation of the other evidence in the cause.

It is well settled that where a policy has not the general clause contained in this, or one of similar import, none can avail themselves of it but those who are named as the parties insured, or on whose account it is expressed to be made. But it is equally clear that a policy in the name of one, with the general clause "for whom it may concern," will cover and protect the interest of any person for whose benefit it was intended, and who authorized it to be effected. And if in the absence of any express order or authority from the owner, or any previous communication with him upon the subject, such policy is effected in his behalf, the intention at the time of the party effecting it

to cover his particular interest, will so connect him with the policy as that his adoption of it afterwards will cause it to inure to his benefit. The subsequent adoption of a policy by a party interested, and for whose benefit it was intended, being deemed equivalent to his prior order for insurance. On this principle the cases of *Routh v. Thompson*, 13 East, 274, and *Hagedorn v. Oliverson*, 2 Mau. & Sel. 485, were decided.

If, then, Newson, at the time of his death, was the owner of the ship *Mohawk*, and Kane, when he gave the order for insurance to the defendant, did it with reference to the interest of Newson's representatives, and intended the insurance for their benefit, the policies on being adopted by the plaintiff would inure to his benefit; and Kane, if he had received the amount insured, would have been answerable over to him, and so with the present defendant into whose hands it has come. Or, if the money had not been paid by the underwriters, actions might have been maintained against them on the policies for the present plaintiff, on proper averments in the declaration of his interest, etc. And the circumstance that the policies were effected by the defendant, under the authority of Kane, makes no difference; acting as his sub-agent, they inure in the same manner that they would have done if they had been effected by Kane himself.

The second prayer, therefore, in the fourth exception was properly rejected, the plaintiff's right to recover being assumed by the terms of that prayer to depend, not on the intention of Kane at that time of giving the order of insurance, but to rest entirely upon the understanding and intention of the defendant. And if it had been granted, the jury must have given a verdict for the defendant, on being satisfied that he effected the insurances as the agent, and for the benefit of Kane, even though they should have believed from the evidence in the cause that Kane himself had in contemplation the interest of Newson's representatives, and intended the insurance for their benefit. But if Kane did not give the order for insurance with reference to the interest of Newson's representatives, but intended it for his own benefit, and not theirs, then the plaintiff is not entitled to recover. For no one can, by subsequent adoption, avail himself of such a policy, who was not at the time in the contemplation of the party procuring the insurance and for whose benefit it was not intended, notwithstanding any interest he may have had in the thing insured. The policy not being effected with reference to his interest, his interest was

not insured, and he, of course, not concerned in the transaction. In the opinion of this court, there is nothing in the first prayer contained in the fourth bill of exceptions. If the bill of sale from Kane to Newson, under which the plaintiff claims, was in fact fictitious, and intended to defraud the creditors of Kane, it does not lie in the mouth of the defendant, standing in the place of Kane's representatives, to set up that fraud in bar of the plaintiff's recovery, however unclean the hands of Newson may have been.

As to the second exception, it is conceded by the counsel for the defendant that there was error in permitting the certificate of Harding to be read to the jury. It is not to be distinguished from any other mere declaration, in writing of a third person, of the existence of a particular fact, which, from its character, can only be proved by the testimony of the witness himself, on oath; and was clearly inadmissible, and most probably was admitted by inadvertence.

The question of interest, arising on the third exception, is one of frequent occurrence in the books, and has been found to be a subject not susceptible of the application of any fixed and general rule of law; the dealings between man and man being so various in their nature that scarcely two cases are to be met with presenting the same aspect, but each depending upon its own peculiar circumstances. There are, indeed, cases, not to speak of bonds, etc., in which interest is recoverable as of right; such as on a contract, in writing, to pay money on a day certain; as in the case of a bill of exchange, or a promissory note; or on a contract for the payment of interest, or where the money claimed has actually been used. But with such exceptions, it has long been the settled practice of the courts of this state to refer the question of interest entirely to the jury, who may allow it or not, in the shape of damages, according to the equity and justice appearing between the parties, on a consideration of all the circumstances of the particular case as disclosed at the trial.

The court below, therefore, did right, in refusing to give the direction prayed, and in submitting the question of interest to the jury. But because the certificate of Harding was suffered to be read in evidence to the jury, as stated in the second bill of exceptions, the judgment of that court must be reversed.

Before judgment was entered in either case, the appellant's attorney dismissed the appeal made by Colt.

Colt's appeal dismissed.

On the appeal by Douglass, judgment affirmed.

"FOR WHOM IT MAY CONCERN," are words often employed in policies of marine insurance. They have received a settled construction in harmony with that placed upon them in this decision. As is stated in 1 Phillips on Ins., sec. 383: "A policy made in the name of a particular person, 'for whom it may concern,' or with any other equivalent clause, will be applied to the interest of the party or parties, and only the party or parties for whom it is intended by the person who effects or orders it, if such party has authorized its being made beforehand, or subsequently adopts it." The intention, therefore, of the party effecting the insurance, determines the application of this clause, where there has been no previous authority, and the validity of the insurance depends upon the subsequent ratification of the contract by the person intended: *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151; *Bauduy v. Union Ins. Co.*, 2 Wash. C. C. 391; *De Bollé v. Pennsylvania Ins. Co.*, 4 Whart. 68; 1 Parsons on Mar. Ins. 47. Were there a previous authority, the intention of the party ordering the insurance or giving the authority must determine whose interests are concerned: *Holmes v. United Ins. Co.*, 2 Johns. Cas. 329. The question of intention is vital in deciding upon the plaintiff's right to recover on a policy under the general clause referred to. This point was urged with considerable warmth by the supreme court of Pennsylvania, in *De Bolle v. Pennsylvania Ins. Co.*, 4 Whart. 68, 75. Judge Kennedy, speaking for the court, adverts to the conclusion arrived at by Phillips on Ins., above quoted, and says: "This would not only seem to be the fair deduction from the authorities on the subject, but to be supported likewise by reason, principles of sound policy and natural justice. For if no evidence were required to be given, tending either to show that the plaintiff had, previously to the policy being effected, authorized it, or that it was intended for him, and he permitted to recover without this by merely showing his subsequent adoption of it, the party effecting the policy and having an interest on board of the vessel, which he intended to protect by it, after receiving what he had at stake, in safety, might sell and transfer his policy to others, whose goods on board of the same vessel had been lost by the perils of the sea, without any policy having been effected for the purpose of covering them; and thus expose the underwriters to a risk that was never contemplated in making the assurance. The injustice arising from the operation of such a principle is manifest, and therefore ought not to be sanctioned. It tends to destroy or prevent the equal chance of gain or loss to the parties, which is regarded in some measure as requisite to sustain the validity of the contract. Besides, it is obvious that it would tend to promote gambling policies, which are deemed void by the law of this state: 3 Yeates, 461; and to render them valid by subsequent events and the agreements of the party procuring them, with third persons, without or even against the consent of the insurers."

Although a policy "for whom it may concern" can not be transferred from one to another so as to cover different objects owned by different persons not within the intention of either party to the contract, yet it is not essential that the party effecting such an insurance should have in mind any specific individual. He may intend it for whatever person should prove to have an insurable interest in the specified subject, in which case it will be applicable to the interest of any one subsequently ascertained to have such an insurable interest who adopts the insurance: *Duncan v. Sun Ins. Co.*, 12 La. Ann. 486. Nor is it necessary that those intended should be known to be so by the broker or by the insurer: *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151. In this case the attention of the court was directed to an instruction given below.

that in policies of the description under consideration "there can be no undue concealment as to the parties interested in the property to be insured." The facts furnished a good illustration of the unsoundness of this general statement. The property insured was that of a belligerent. The court, per Johnson, J., said that to affirm the doctrine as was done below "is obviously going much too far, since the underwriter has an unquestionable right to be informed if he makes inquiry—the assured may be silent, it is true, if he will, and let the premium be charged accordingly—but if the inquiry then made should be responded to with information contrary to the verity of the case, this obviously gives a conventional signification to the terms of the policy, which may differ materially from the known and received signification in ordinary cases. He, for instance, who should insure 'for whom it may concern,' under an express assurance that there is no belligerent interest in the cargo, could not, upon any principle, be held to have made assurance upon belligerent interest. This is no more than an application of the general principle that assurance is a contract of good faith, and is void whenever imposition is practiced."

By this same case it was recognized that a policy "for whom it may concern," will in ordinary cases cover belligerent property. And a like principle was stated in *Seamans v. Loring*, 1 Mas. C. C. 128.

As a general proposition the clause we are considering, and others of similar import, apply only to those who were contemplated at the time the insurance was made, and who then had an insurable interest in the subject-matter: 1 Parsons on Mar. Ins. 46, citing: *Routh v. Thompson*, 11 East, 428; *Bauduy v. Union Ins. Co.*, 2 Wash. C. C. 391; *Catlett v. Pacific Ins. Co.*, 1 Paine, C. C. 594; *Haynes v. Rowe*, 40 Me. 181; *Protection Ins. Co. v. Wilson*, 6 Ohio St. 553; *Seamans v. Loring*, 1 Mas. C. C. 127; *Lambeth v. Western F. & Mar. Ins. Co.*, 11 Rob. La. 82; *Alliance Mar. Ass. Co. v. Louisiana State Ins. Co.*, 8 La. 1, 11; *Frierson v. Brenham*, 5 La. Ann. 540.

In regard to bringing an action on such a policy it seems to be the prevailing opinion that either the party named in the policy or the one who proves himself to be "concerned" may institute proceedings, each in his own name: 2 Parsons on Mar. Ins. 44 *et seq.* In Pennsylvania, one decision doubts the right of a person not named in the policy to bring covenant upon it, but does not dispute his right, when interested and intended to be embraced by the terms thereof, to maintain assumpsit: *De Bolle v. Pennsylvania Ins. Co.*, 4 Whart, 68. In a recent Maine case this question was directly presented, and Appleton, J. C., said: "A suit in a case of loss may be maintained upon such policy in the name of the party affecting the policy or in the name or names of those for whose benefit it was made, and who are, and are intended to be insured under the clause 'on account of whom it may concern,' or some similar form of expression, although they are not named in the policy." *Sleeper v. Union Ins. Co.*, 65 Me. 385. Here the part owner of a vessel effected a policy for the benefit of whom it may concern, and upon his death his administratrix was allowed to maintain an action on the policy. In *Barnes v. Union M. F. Ins. Co.*, 45 N. H. 21, 28, the adjudications are collected which hold that the agent obtaining the policy for whom it may concern, may bring an action in his own name. It is noticeable that in each of these cases last referred to the action was assumpsit.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

THOMPSON v. LAY.

[4 PICKERING, 48.]

RATIFICATION OF INFANT'S CONTRACT. A mere acknowledgment by one after arriving at full age, of a debt contracted during his infancy, is not sufficient. There must be an express ratification.

A CONDITIONAL PROMISE TO PAY when the defendant is able, imposes on the plaintiff the necessity of proving ability.

ASSUMPSIT on a promise of the defendant's wife made before marriage. Plea, infancy. Reply, ratification after arriving at full age, and before marriage. To prove the ratification, plaintiff showed that the wife, after coming of age, and before her marriage, had promised to pay the money due on the note as soon as she had the means, or as soon as she should be able. The case was submitted on the sufficiency of this evidence to maintain the action.

E. H. Mills and Ashmun, for the defendants, cited *Ford v. Phillips*, 1 Pick. 803; *Whitney v. Dutch*, 14 Mass. 460 [7 Am. Dec. 229].

Blair, contra, cited *Martin v. Mayo*, 10 Mass. 137 [6 Am. Dec. 103].

By Court, PARKER, C. J. The authorities cited, especially the cases of *Whitney v. Dutch*, [7 Am. Dec. 229], and *Ford v. Phillips*, explicitly lay down the principle that the promise of an infant can not be revived, so as to sustain an action, unless there be an express confirmation or ratification after he comes of age. Such a ratification may be proved in divers ways; but it can not be inferred from a mere acknowledgment of debt, as

in the cases on the statute of limitations. A promise to pay is evidence of a ratification, so is a direct ratification, though not in words amounting to a direct promise, as if the party should say, after coming of age, I do ratify and confirm, or do agree to pay the debt.

But a ratification may be absolute or conditional. If it be the latter, the terms of the condition must have happened or have been complied with before an action can be sustained. I ratify and confirm my promise, provided I receive a certain legacy, or if I succeed to a certain estate, or if I recover a certain sum of money, or if I draw a prize in a certain lottery, would make a conditional promise or ratification, sufficient to make the defendant liable on a contract made when a minor, when the events happen, but not before. So, an engagement or promise to pay when able, is a conditional promise, and the plaintiff, to avail himself of it, must give in evidence the ability of the defendant. It would not be necessary to show an ability to pay without inconvenience, but evidence that there is property from which the debt might be paid, or an income from some source which would enable the party to pay, would be sufficient. The cases cited by the plaintiff's counsel are bottomed upon this principle. That of *Martin v. Mayo*, [6 Am. Dec. 103,] is thought to be of a different description, but we understand the court to have there explicitly admitted the principle, but to have decided that the words appended to the promise did not constitute a condition, but merely postponed the time of payment. If there was any error, which, however, we do not perceive, it was not in the principle adopted, but in the construction of the words of the promise.

Plaintiffs nonsuit.

Followed in *Reed v. Batchelder*, 1 Met. 560; *Proctor v. Sears*, 4 Allen, 96.

RATIFICATION OF INFANT'S CONTRACT.—See *Rogers v. Hurd*, 4 Am. Dec. 182, and note; *Martin v. Mayo*, 6 Id. 103. Upon a sale made to an infant, see *Oliver v. Houdlet*, 7 Id. 134, and note.

COOLEY v. DEWEY.

[4 PICKERING, 93.]

A BASTARD'S MOTHER does not inherit his estate.

APPEAL from the decree of the probate court ordering the estate of Darius Ely, deceased, intestate, to be distributed among the appellants and appellees. The appellants claimed the whole of the estate, as brother and sister of Darius' mother, Darius being a bastard.

Bliss, sen., and Lathrop, for the appellants.

E. H. Mills and Ashmun, contra, cited Prov. Stat. 7 Wm. III., c. 6, sec. 1; Stat. 1785, c. 69, secs. 1, 6; *Petersham v. Dana*, 12 Mass. 433; Reeves Dom. Rel. 275; 8 Hammond's Com. Dig., Bastard.

By COURT, PARKER, C. J. The merits of this appeal depend upon the question whether the mother of Darius Ely, he being a bastard, was within the meaning of the statute of distributions, his next of kin; for if he succeeded to his estate on his death, the two appellants, being her sisters, would of course take the whole between them either as heirs of their sister Sybil, or through her as next of kin to the intestate.

It is not shown nor contended that by the common law their claim can be maintained; for there seems to be no maxim of that law less questionable than that a bastard is a *filius nullius*. I do not know that it makes any difference whether the person claiming to succeed to a bastard be father or mother; there certainly is no express distinction of that sort. Whatever may be the grounds or policy of the law, they seem to apply as well to the mother as the father, except that there is a greater certainty of the mother than of the father; but if it were the certainty only which originated this law, it might be supposed that it would have been left to depend upon proof of the fact; for in many cases the true father might be found with sufficient certainty. No doubt the law was so established on higher principles than the interest of individuals. It was to render odious illicit commerce between the sexes, and to stamp disgrace on the fruits of it; and though the punishment usually falls upon the innocent, yet it was thought wise to prohibit them from tracing their birth to a source which is deemed criminal by law and by religion. It is enough that those who have been the authors of this misfortune have the power to repair it by will or by gift; the law will not interpose. And if it will not for the benefit of the child, the only innocent party, surely it will not allow the guilty to found a claim of property upon a relation to the child whom they have exposed to these disabilities and privations. Our statute of distributions, though borrowed from the civil law, can not be construed to have repealed the common law in this respect. It merely provides for the distribution of property according to the rules of that law among lawful kindred, without adopting its principles in settling who shall compose that kindred. It is by the grace and favor only

of the legislature that the appellants are entitled to anything, and they ought to be content to share a gift with others according to the will of the donor.

It was stated in the argument of this cause that the supreme court of Connecticut had decided that an illegitimate child might inherit the lands of his mother. The case referred to had not then appeared in the printed reports, but we have seen it since in the fifth volume of Connecticut reports. It is the case of *Heath et ux. v. White*, 5 Conn. 228. In the opinion of the court, as expressed by Chief Justice Hosmer, the statute provision for descent of intestate estates controlled the common law, which, it was admitted, would not support such an inheritance; and considerable stress is laid upon the term children, as used in the statute, instead of lawful issue or other more technical words of the common law. With the greatest respect for those learned judges, we are not able to adopt the opinion that our legislature, in using the same term in our statute of descents and distributions, intended to apply the term to those who by the common law were not deemed children in a relative sense to parents; but we should think if such had been their intention, an express provision would have been made for illegitimates. Nor do we see any particular reason for giving this construction of the term children in relation to the estate of the mother any more than to that of the father; for although the filial relation is more difficult of proof in the latter than in the former case, yet it is capable of proof, and there seems to be no difference in the cases.

It is intimated in the cases referred to, that the legislature of Connecticut probably intended to adopt the principle of the civil law on this subject; but we are satisfied that such was not the intention of the legislature of Massachusetts. They followed the English statute of distributions in regard to personal estate, and applied it to real estate as well as personal, without any design to deviate from the common law any further than is expressly provided by the statute. And it may be remarked, that in the statute of Charles the word children is used as in the Connecticut and Massachusetts statutes, but that illegitimate children do not, in England, inherit or participate in the distribution. Mr. Justice Bristol dissented from the opinion of the court in the case upon which we have been commenting.

Cited in *Pratt v. Atwood*, 108 Mass. 41, as determining that by the common law of England, which was the common law of Massachusetts in this

respect, a bastard had no inheritable blood and could not, therefore, inherit even from his mother. Reference is made to the principal case, in *Inhabitants of Monson v. Inhabitants of Palmer*, 8 Allen, 554, in connection with the statutory change of the law, enabling a mother to inherit from her bastard child. In *Kent v. Barker*, 2 Gray, 536, this case is quoted in support of the position that "child" or children in a statute, mean legitimate children only.

CRANE v. MARCH.

[4 PICKERING, 181.]

ATTACHING THE EQUITY OF REDEMPTION.—Where a negotiable note, secured by a mortgage, is transferred without an assignment of the mortgage, the indorsee may attach the equity of redemption, and sell the same under execution in an action against the promisor.

IN SUCH A CASE the mortgage still remains in force, the mortgagee being, in equity, the trustee for the holder of the note.

WRIT of entry. On the fourth of April, 1816, Nason being seised in fee of the demanded premises, mortgaged them to Day to secure the payment of five negotiable notes, payable in five successive years. In April, 1823, Nason executed a mortgage of the same premises to the demandant to secure the payment of five hundred dollars, which sum remains unpaid. Prior to this second mortgage, in February, 1823, but three of the notes having been paid, Billings, an indorsee of one of the two notes, commenced suit on his note against Nason, and attached the latter's equity of redemption in the mortgaged premises. In August following, this equity was sold on execution to one Jacob March, under whom the tenant holds. In 1824, the tenant paid the amount of the fifth note to the then holder, and in 1825, Day assigned the mortgage to the tenant and other heirs of Jacob March. The cause was submitted upon a statement containing the above facts.

J. Davis and Allen, for the demandant, contended that by a separation of the note and mortgage, the mortgagee's interest in the land, which was but an incident of the debt, was gone, and the legal estate vested in Nason, so that the sale of a supposed equity was void. Nor could Day be considered trustee for the holders of the notes, there being no declaration in writing and no trust resulting by implication of law, from the evidence adduced: *Northampton Bank v. Whiting*, 12 Mass. 104; *Jenney v. Alden*, Id. 375; *Goodwin v. Hubbard*, 15 Id. 210; *Storer v. Batson*, 8 Id. 431. The note to Billings being sued upon, the recovery of judgment thereon was so far a discharge of the

mortgage: *Porter v. Perkins*, 5 Mass. 237 [4 Am. Dec. 52]; *Perkins v. Pitts*, 11 Id. 125; and the payment of the last note discharged the mortgage entirely: *Vose v. Handy*, 2 Greenl. 322 [11 Am. Dec. 101]. The mortgagee cannot levy on the right in equity in a suit upon the demand secured by the mortgage: *Atkins v. Sawyer*, 1 Pick. 351 [11 Am. Dec. 188].

Newton and Sibley, contra.

By Court, PARKER, C. J. By the statement of facts it appears that when the demandant took his deed of mortgage he acquired only the equity of redemption of the mortgage to Day, and that subject to the lien which Billings had acquired by attachment. That attachment having ended in a judgment and sale of the equity on execution, the demandant's right was reduced to a right to redeem that equity within a year; and if he redeemed that, he would have a right to redeem the original mortgage to Day, by paying the notes which remain due. But he did not redeem nor make any tender within a year; so that, if that sale of the equity was good, he has lost all his right; if void, he then has a right to redeem by paying off the two notes, because the tenants, or those whom he represents, has become entitled by assignment to that which was assigned by Day to Grout. And as the tenant stands now in the place of the mortgagee by virtue of the assignment of the mortgage, he has a right to require payment of the whole debt originally secured by the mortgage; and he would hold as trustee of Billings the amount of the note which had been assigned by Day to him, and then showing that J. March had paid Billings on the sale of the equity, he would have a right to retain the amount so paid.

The question then is on the validity of the sale of the equity; and it is said to be void according to the decision of this court in *Atkins v. Sawyer*, [11 Am. Dec. 188], because the holder of a note or bond secured by mortgage shall not be allowed to satisfy his debt by a sale of the equity, and thereby reduce the time of redemption from three years to one, contrary to the original intent of the parties. In that case it was the mortgagee himself who sued the note, and caused the equity to be sold; in this it is an assignee, who, for aught that appears, took the note for a valuable consideration, and it may be without any knowledge that it was secured by mortgage. It is true that when he attaches the equity, he may be presumed to know that the note assigned to him was secured by the mort-

gage, though the record would inform him only that a note of like tenor and date was so secured. And if he took the note up on the expectation that it would be paid according to the terms of it, there does not seem to be any reason why he should not avail himself of the right which any other creditor, save the mortgagee, would have to procure satisfaction of his note from the equity of redemption.

Is the negotiable quality of a promissory note destroyed or impaired by reason of its being secured by a mortgage of land? Certainly not. It passes to the assignee with all its legal qualities. Shall the indorsee for valuable consideration be restricted in his right to compel payment by attaching any of the property of the maker? We do not perceive that to be the case. The difference between him and the mortgagee is that the latter already holds the land by contract in such a manner as to give the mortgagor certain legal rights as to the time and manner of defeating his estate, and therefore he ought not to be allowed to resort to process against the same land, which will necessarily abridge those rights. But no such contract, express or implied, is made with the indorsee, who is presumed to have taken the note in the manner such securities are usually transferred. The difficulty also would be greater to the purchaser of an equity thus sold, than, as suggested in *Atkins v. Sawyer*, would occur when the mortgagee himself was the judgment-creditor at whose instance the equity was sold, for in that case he might see by the record the relation in which he, for whose use the equity was sold, stood to the mortgagor; whereas if sold at the instance of the assignee of the note, he would learn nothing by the records but that a similar note was secured by the mortgage. This is certainly a difficult question; but I am inclined to think the sale in equity in this case was valid in law, and that there is a reasonable distinction between this case and that of *Atkins v. Sawyer*.

It is true the mortgagor may be subject to some of the inconveniences suggested in that case; but they are of his own creation, as they arise out of the form of the contract which he chose to make. In the form usually practiced in regard to mortgages, until lately these difficulties could not occur, for the collateral personal security was a bond, which not being assignable at law, the action upon it would be always in the name of the obligee, and the assignee in equity could avail himself of no means of enforcing payment from which the obligee would be restricted. So that mortgagors may protect themselves from

having their time of redemption reduced by giving bonds, or notes not negotiable, instead of negotiable notes, which have become so common a medium of business that their efficacy ought not to be restrained. It may be objected that it will be easy for mortgagees holding such securities, to effect the purpose which seems to have been intended in the case of *Atkins v. Sawyer*, by nominally assigning them to some friend who will attach the equity for their benefit; but all that the law can do in regard to fraudulent practices is to avoid them when they are proved to exist. A possible abuse is no reason against the soundness of a legal principle.

In determining that the sale of the equity on the execution of Billings was valid in law to pass the estate of the mortgagor, subject to the mortgage existing before the attachment, it was necessarily determined that the mortgage to Day was then in force notwithstanding the separation of the notes from the mortgage, for otherwise there would have been no equity to sell, the legal estate being in such case revested in the mortgagor. But that could not be the case, for at the time of the mortgage to Crane, the condition of the first mortgage had been broken, and nothing but an equitable interest remained in the mortgagor. The subsequent transfer of the notes could not work a change of the title; on the contrary, according to the principles of equity courts, the mortgagee remained the trustee of those to whom he had assigned the debt, and in chancery he would be compelled either to sue the mortgage, or to foreclose for the benefit of the assignee, or to assign the mortgage to the holder of the debt. And if the power of executing this equitable principle does not exist in the courts here, still the application of the principle can not be denied, when the form of proof will admit of it.

Judgment for tenant for costs.

Cited in *Washburn v. Goodwin*, 17 Pick. 139; *Johnson v. Stevens*, 7 Cush. 434; *Young v. Miller*, 6 Gray, 156; approved in *Breen v. Seward*, 11 Id. 120; *Rice v. Dewey*, 13 Id. 49. The following explanation of and comment upon the principal case is made in *Andrews v. Fiske*, 101 Mass. 422, 425. "In *Crane v. March*, 4 Pick. 131, the indorsee of one of two notes secured by mortgage recovered judgment and levied upon the equity of redemption. The purchaser under the sale on execution, afterwards took up the other note from the original mortgagee an assignment of the mortgage. It was held that he had acquired a good title. The suggestion that the indorsee may have taken the note 'without any knowledge that it was secured by mortgage,' could not have been of material influence in the decision. The real ground upon which the decision stands is, that by the form of the note, the mortgagor authorized its transfer to other parties than the holder of the

mortgage, with all the incidents and legal rights which pass with the transfer of such securities. Such other parties are not to be deprived of the usual incidents and rights because they may, if they see fit to seek it, have an equitable resort to the mortgage security. By levying upon the equity, they elect to rely upon their legal right. The debtor is not harmed, for he may redeem from the sale without redeeming the mortgage, and if he should suffer some degree of prejudice, it is only the natural result of what he has himself authorized."

WATERS v. LILLEY.

[4 PICKERING, 145.]

THE RIGHT TO FISH in an unnavigable stream is in the owner of the soil, to the exclusion of the public.

A CUSTOM TO TAKE ANYTHING from another's land, or for a profit *a prendre*, is not a lawful custom. If such a right is available at all, it must be set up by prescription, as belonging to some estate, and should be pleaded with a *que estate*. It can not be given in evidence under the general issue.

TRESPASS for breaking plaintiff's close and taking fish from a dam thereon. Plea, the general issue. It was admitted that the defendant did enter and take the fish, and that the plaintiff was the owner of the land covered by the water, from which the fish were taken. The defendant then offered to prove that the pond in which the fish were caught was but an enlargement of a stream of water caused by the plaintiff's dam; that the stream was a natural stream, and large enough for the sustenance of fish, and that the inhabitants of the vicinity have, from time immemorial, taken fish in the pond and stream, without any interruption from the plaintiff or any of the previous owners of the *locus in quo*, who were knowing to this custom. This evidence was rejected, and a verdict directed for the plaintiff. Defendant excepted.

Barton, in support of the exceptions. The right to fish in the non-navigable waters of this state is in the public, not in the owners of the soil: Prov. St. 8 Anne, c. 3; St. 1818, c. 45; St. 1819, c. 49; *Burnham v. Webster*, 5 Mass. 269. And the plaintiff can not abridge this right by enlarging the stream: *Stoughton v. Baker*, 4 Mass. 528 [3 Am. Dec. 236]; *Coolidge v. Williams*, Id. 144. The defendant should have been permitted to prove the custom, as offered: Bac. Abr., Custom, C. The evidence was admissible in actions before a justice of the peace, under the general issue: St. 1783, c. 42, sec. 7.

Newton and Sibley, contra. The plaintiff had an exclusive

right to fish in the pond: Bac. Abr., Piscary; Anc. Charters, 148, 149; *Coolidge v. Williams*, 4 Mass. 144; *Adams v. Pease*, 2 Conn. 481; *Carter v. Murcol*, 4 Burr. 2164. The inhabitants of a town can not prescribe for profits *in alieni solo*, but only for an easement: Com. Dig., Prescription, H; *Smith v. Gatewood*, Cro. Jac. 152; *Baker v. Brereman*, Cro. Car. 419. The supposed custom, if valid, should have been specially pleaded: 1 Chit. Pl. 364, 365; *Spear v. Bicknell*, 5 Mass. 125; *Strout v. Berry*, 7 Id. 385.

By Court, PARKER, C. J. The case states that it was proved that the defendant entered the plaintiff's close and took the fish as set forth in the declaration, and that the defendant admitted that the plaintiff was the owner of the land under the water where the fish were taken. Thus the plaintiff's title is made out until the defendant should be allowed to give evidence of a custom for all the inhabitants of the vicinity to take fish in the pond within the plaintiff's close, and that the pond was merely an enlargement of a natural stream of water produced by a dam built by the plaintiff. It is not contended that the plaintiff had not a right to erect this dam, and so to stop the stream of water and flow his own lands by means of the ponds so artificially made, and it surely can not be supposed that in consequence of this exercise of a lawful right every one of the vicinity acquired a right to take fish in that pond. The law does not take any notice of the right of fishery in small streams and rivulets any further than to secure to owners of the banks of such streams the right of taking fish therefrom. If the stream is not navigable for boats, or any water craft, the owner of the land can exclude every one from the right of fishing; and therefore it is that the legislature, in establishing the right to occupy such streams for the use of mills, have made no provision in regard to fish, except where there is a communication with the sea or salt water, through which fish from that element have been wont to pass into the fresh water streams and ponds to cast their spawn and multiply their species. There is, therefore, no such general right as is suggested by some of the facts proposed to be proved.

As to the custom, it might be sufficient to say that if it were a legal custom, and could be proved to exist, it would not be a defense under the general issue, but ought to be specially pleaded, notwithstanding the action was commenced before a justice of the peace, for it affects the title to land as much as an easement of a right of way, which, in the case of *Strout v.*

Berry, 7 Mass. 385, was decided to be proper matter for a special plea, and not for the general issue. But the custom proposed to be proved is not one that could be sustained in law, even if specially pleaded; for a custom to take anything from another's land or for a *profit a prendre*, is not a lawful custom. If such a right is available at all, it must be set up by prescription as belonging to some estate, and should be pleaded with a *que estate*. So it was decided in *Gateward's case*, 6 Co. 60; and Coke says: "Note, reader, the law in this general case well resolved, and no book in the law is adjudged against it." And in the case of *Grimstead v. Marlowe*, 4 T. R. 718, Lord Kenyon says the law has been so settled ever since the time of *Gateward's case*.

The court of common pleas rightly rejected the evidence offered by the defendant, and the judgment of that court must be affirmed.

Followed in *Commonwealth v. Alger*, 7 Cush. 98; *McFarlin v. Essex Company*, 10 Id. 310; *Codman v. Evans*, 5 Allen, 310; *Commonwealth v. Vincent*, 108 Mass. 447.

CUSHING v. HURD.

[4 PICKERING, 253.]

NOTICE OF UNRECORDED DEED will destroy the legal effect of an attachment levied upon the land as belonging to the grantor. But knowledge of an intent to convey will not produce this result.

WRIT of entry. The contest was between two creditors of T. Cushing, who failed May 8, 1818. The demandant's title was derived by a mortgage from T. Cushing executed and acknowledged on the eighth, and recorded before sunrise on the ninth. The tenant's title was derived under an execution, in pursuance of an attachment levied on the ninth of May, 1818, at two o'clock, A. M. The demandant contended that the tenant had notice of his deed; but if not, that as he had used due diligence in sending his deed to the register's office, his deed must be preferred to the levy. It also appeared that T. Cushing's title was under a mortgage from one Thacher, dated in 1814, and an execution subsequently extended on the same land; and that T. Cushing assigned the mortgage to the demandant in August, 1820. The demandant contended the tenant's attachment and levy could not defeat the title of the assignee of the mortgage. Judge Wilde thought that the subsequent levy of his execution

by T. Cushing passed to him a legal estate which might be attached, and so ruled. The jury were also instructed that if they should find that the tenant had notice of the deed after it was executed and delivered, and before the levy of his attachment, their verdict should be for the demandant; but that if the notice was of deed being drawn but not then executed, the tenant should have a verdict. Verdict for the tenant.

L. Shaw and L. Williams, for the demandant.

S. D. Ward, contra, cited: *Brown v. Maine Bank*, 11 Mass. 158; *Trull v. Bigelow*, 16 Id. 406 [8 Am. Dec. 144]; *Warden v. Adams*, 15 Id. 233; *Priest v. Rice*, 1 Pick. 168 [11 Am. Dec. 156].

By Court, PARKER, C. J. Supposing that Thomas Cushing acquired a title to this land by the levy of his execution thereon, he having before a mortgage of the same land from Thacher, the former owner, the question is, which of Cushing's two creditors, the demandant or the tenant in this action has acquired a legal title against the other. The demandant holds under a mortgage-deed from Cushing, and the tenant under a levy of an execution. The premises thus levied on had been attached, and that attachment, if good at the time, continued in force until the levy. It is agreed that the attachment was made before the deed was recorded, but not until after it was executed and delivered. The case then turns upon the knowledge of the tenant of a title in the demandant when he caused his attachment to be made. If when he set out to make this attachment, the title to the land had passed from Cushing to the demandant by an actual delivery of the deed, then to intercept him by an attachment before he could with all due diligence procure a registry of his deed, might, according to the case of *Priest v. Rice* [11 Am. Dec. 156], be fraudulent, and his attachment would fail. But here the deed was only about being made, and this fact the tenant knew; his case, therefore, is not determined by *Priest v. Rice*. He had a right to try his speed in this case as much as if the demandant had been about obtaining his security by attachment, and while his writ was preparing, the tenant had been more expeditious, and had procured the first attachment; and there is no more appearance of fraud than there would have been if the demandant, knowing that the defendant was preparing to attach, had procured a deed and caused it to be recorded before the writ could be served. The case of *Priest v. Rice* goes upon the ground that a complete title had vested in the grantee against the grantor and his heirs,

which was fully known to Rice, the attaching creditor. It was considered that the effect of this knowledge upon Rice's attachment was the same as it would have been upon a title acquired by a deed made by the debtor, and registered before a prior deed to the demandant.

The principle which is to govern in this case was settled in *Warden v. Adams*, 15 Mass. 233. The demandant, Warden, and Hamilton, the lessor of the tenant, Adams, were both creditors of Earle, who held a mortgage of the land of Adams. Two of the six notes which were secured by the mortgage were intended to be assigned to Warden, and also the mortgage deed; all of which were put into the hands of a scrivener for the purpose of having the assignment written. One of the notes had been assigned to Hamilton, who, knowing of the intention of Earle to make the assignment of the mortgage to Warden, and knowing that the papers were lodged with a scrivener for that purpose, procured an assignment on a separate paper before the transaction was complete in favor of Warden. It was held that Hamilton had lawful right by his diligence, to supplant Warden, and his right to the mortgage was established. It was not, therefore, the knowledge of an intent to convey or attach which will prevent the legal effect of an attachment by another creditor, which gets to be first in point of time, but the knowledge of an actual passing of the title, which is complete against every one with notice, whether by registry or personal.

It has been argued that he who has fairly obtained a deed from a failing debtor should have reasonable time to get his deed recorded; but there is nothing to warrant this position against subsequently attaching creditors or subsequent purchasers without notice. If such were the law, the intention of the registry act would fail. The reasonable time, which has been mentioned in some of the cases, is applicable only to cases of constructive fraud which may be rebutted by such laches as would give ground to believe that the bargain had been rescinded, there being no registry of the deed and no change of possession in the land conveyed.

Judgment for the tenant.

Cited in *McGregor v. Brown*, 5 Pick. 175; *Andrews v. Fisk*, 101 Mass. 425; and relied upon in *Briggs v. Parkman*, 2 Met. 267.

UNRECORDED INSTRUMENTS ARE VALID against all persons having actual notice thereof: *Newman v. Chapman*, 14 Am. Dec. 766; *McMechan v. Griffing*, 15 Id. 198; *Givens v. Branford*, 13 Id. 702 and note; *Priest v. Rice*, 11 Id. 156 and note.

BORDEN v. SUMNER.

[4 PICKERING, 265.]

A GENERAL ASSIGNMENT BY AN INSOLVENT DEBTOR in trust to pay the proceeds in satisfaction of the claims of certain of the creditors, in full, and to apply the residue *pro rata* among such creditors as shall within a given time release their claims against the debtor is invalid, as against a dissenting creditor, so far as respects the surplus not wanted to discharge the demands of those who have assented.

IN SUCH A CASE one summoned as trustee of the debtor, under a foreign attachment, was adjudged trustee, it not appearing that the amount due from him was needed for the payment of the assenting creditors.

SCIRE FACIAS to obtain execution against the defendant, who had been summoned in a foreign attachment as the creditor of one Hutchinson. The defendant showed cause that Hutchinson had made an assignment of all his property to the value of twenty-five thousand dollars in trust for the payment of certain creditors, in full, and to apply the residue to the payment *pro rata* of the claims of such other creditors as would, within six months, release Hutchinson from their demands against him. This assignment was urged to be invalid.

G. Wheaton, for the plaintiff, cited *Widgery v. Haskell*, 5 Mass. 144 [4 Am. Dec. 41]; *Riggs v. Murray*, 2 Johns. Ch. 582; *Harris v. Sumner*, 2 Pick. 129; *Hyslop v. Clarke*, 14 Johns. 458; *Ingraham v. Geyer*, 13 Mass. 146 [7 Am. Dec. 132]; *Hastings v. Baldwin*, 17 Id. 552.

A. Cushman, for the assignees, who had become a party to the suit.

By Court, PARKER, C. J. The question referred to the court is, whether the deed of assignment disclosed by the trustee is valid, so as to pass to the trustees therein named the debt admitted to be due from the respondent to the principal debtor. The supposed invalidity of the conveyance rests upon the provisions of the instrument itself, there being no evidence or suggestion of fraud upon creditors in the transaction, *dehors* the instrument; and the only objectionable provision in the deed is that which requires of the creditors, in order to share in the distribution of the property, to release and discharge the assignor from their demands against him, without regard to the amount which they shall receive from the funds. This seems to have been one of the grounds for setting aside a similar conveyance in the case of *Widgery v. Haskell*, 5 Mass. 144 [4 Am. Dec. 41], though in that case the question as to the validity of the

assignment was limited to a ship, which was embraced within the general terms of the conveyance, but was attached before she came into the actual possession of the assignees.

It was an important consideration too in that case, that property to an amount sufficient to pay the demands of the creditors particularly provided for in the assignment, and those of the assignees themselves, who were also creditors, had been received by the trustees under the assignment, so that the ship, which was the subject of the action, was not needed for those purposes, and if the right of the assignees had been established, they could only have held in trust for the general creditors; and as these had not come into the compact by signing the instrument and thereby agreeing to discharge their demands, it was held that the ship itself was liable to attachment by any one or more of the dissenting creditors. It is not, therefore, a necessary inference from that decision, that the clause in the assignment similar to that which is objected to in this case, rendered the whole conveyance void. And we are not necessarily brought to a decision of that question in this case, for it appears by the schedules of debts provided for and of property conveyed by this assignment, that the latter exceeds the former by the sum of ten thousand dollars.

Admitting then, as we may do in this case without determining the question, that the assignment is valid to the extent of the claims of those creditors who became parties to the instrument, we do not perceive why the surplus should go into the hands of the trustees, when in fact there would be no *cestuis que trust* for that surplus. To determine otherwise would be to deprive the dissenting creditors of any advantage from this surplus, for the assignees could not be answerable on the trustee process, if it consisted of debts, until it should come into their hands, and thus creditors would be hindered and delayed in recovering their debts by the acts and doings of the principal debtor, and a favored portion of the creditors. This would be as stated in the case of *Widgery v. Haskell* [4 Am. Dec. 41], to allow the debtor to make a bankrupt law for himself, and, according to the general spirit of these assignments, it would be wholly without that equality towards creditors which is certainly the best feature of public bankrupt systems. We can not, therefore, give such effect to assignments of this nature, as to allow the funds of the debtor to be locked up against creditors, when the funds are not wanted for distribution among those who have come into the compact. Whether the possession of

the trustees, of property which has come to them by the assignment, and which is not necessary for the payment of those creditors who have become parties, can be disturbed by an attachment made by a dissenting creditor, we think has not been decided, and we reserve ourselves upon that important question until it shall be directly presented to us.

It may be said that if such an assignment is valid at all, the assignees are entitled to all the property conveyed, because it cannot appear, until a final conversion of the property conveyed into money, that there will be sufficient to satisfy the demands of the assenting creditors; but we think, in order to avoid an attachment, or the effects of the trustee process, by virtue of the assignment, the assignee must show and prove, as he will have an opportunity to do, by becoming a party to the suit, that the property attached or debt arrested is wanted to answer the valid purposes of the assignment. If he fail to do this, it ought to remain subject to legal disposition, for the use of the creditor making the attachment. In the present case, *prima facie*, there are ample funds to pay the creditors who are parties to the assignment, and as there is no evidence offered to the contrary, the person summoned as trustee must be charged to the amount of the debt which he owes, if that is not more than sufficient to satisfy the plaintiff's judgment.

Cited in *Fall River Iron Works v. Croade*, 15 Pick. 18; *Bradford v. Tappan*, 11 Id. 76.

ASSIGNMENTS EXACTING RELEASES from the creditors of a debtor in failing circumstances, of their entire demands, as a condition precedent to their receiving any portion of the property assigned, are regarded invalid in New York: *Grover v. Wakeman*, 11 Wend. 187; *Hyslop v. Clarke*, 14 Johns. 458; *Spaulding v. Strang*, 38 N. Y. 9, 12; in Ohio: *Atkinson v. Jordan*, 5 Ohio, 293; *Woolsey v. Urner*, Wright, 606; in North Carolina: *Hafner v. Irwin*, 1 Ired. L.; in Missouri: *Brown v. Knox*, 6 Mo. 302; *Drake v. Rogers*, Id. 317; in Georgia: *Miller v. Conklin*, 17 Ga. 430; *McBride v. Bohanan*, 50 Id. 527; *Francis v. Herz*, 55 Id. 249; in Texas: *Carlton v. Baldwin*, 22 Tex. 724; *Baldwin v. Peet*, Id. 708; in Tennessee: *Wilde v. Rawlings*, 1 Head, 34; in Maine: *Pearson v. Crosby*, 23 Me. 261; *Wheeler v. Evans*, 26 Id. 133; in Minnesota: *Bennett v. Ellison*, 23 Minn. 242; in New Hampshire: *Hurd v. Silsbee*, 10 N. H. 108. These decisions, in some instances, are based upon statutory enactments, and in others are placed upon the broad ground of public policy, in that such assignments coerce creditors into a relinquishment of part of their demands, that they operate to reserve to the debtor himself a material and substantial benefit as the direct result of the transfer, and that they enable a debtor to obtain a discharge from his liabilities on better terms to himself than insolvent laws allow to a debtor who applies for their benefit. In some of the above states, the law, as at present existing, is not the same as that which prevailed at an earlier period, statutes having worked

a change. Such is the case with Maine, New Hampshire, Pennsylvania, Alabama, and other states. The statutes of the first are a good example of the perplexity that has prevailed upon this subject. The cases above cited from Maine, against the validity of releases, were decided under the act of 1836. By the statute of 1844, an assigning debtor may exact a release.

The clauses providing for a release from all liability are of two classes: 1. Those that deny all benefit under the assignment to the non-releasing creditors; and, 2. Those that give a preference to the releasing over the non-releasing creditors. In regard to the effect of these respective clauses some of the states make a distinction holding that the preference clause is valid, and the other invalid, while others declare both clauses invalid. Of the latter class is New York. Speaking of assignments which provide for the payment of the debts of those executing releases before those who will not release are paid, Parker, J., delivering the opinion of the court in *Spaulding v. Strang*, 38 N. Y. 9, 12, says: "The law is undoubtedly well settled that such assignments are *mala fide* on their face, and void as against creditors: *Hyslop v. Clarke*, 14 Johns. 458; *Grover v. Wakeman*, 11 Wend. 187. The reason is obvious. It is a clear attempt, by the debtor, to coerce his creditors to accede to his terms, and withholding of his property from them to a greater or less extent unless they do so accede; this is a hindering and delaying of creditors which the statute prohibits. In *Wakeman v. Grover*, 4 Paige, 23; S. C., 11 Wend. 187, the broad principle was laid down that the requirement of a release from any of the creditors, though as a consideration of preference merely, and without any direct reservation of the share of the non-releasing creditors to the assignor himself, avoids the assignment. The authority from Minnesota, above referred to: *Bennett v. Ellison*, 23 Minn. 242, adverts to the position taken by the New York cases, without approval or disapproval. The decision of that point was not necessary in determining the rights of the parties in the cause before the court. But the language of the opinion and the reasoning employed, would seem to indicate an inclination in favor of the exposition of the law given in *Wakeman v. Grover*. The same conclusion was adopted in *Hall v. Denison*, 17 Vt. 310, although a subsequent act required all assignments to be for the benefit of all creditors in proportion to their respective claims. But upon the validity of assignments requiring releases as a condition to preference merely, the adjudications in the various states are not uniform. Burrill on Assignments, sec. 195, makes the statement, on the authority of Chancellor Kent, 2 Com. 536, in note, that the general rule is in favor of the right of the debtor to prefer some of his creditors to others through the medium of a stipulation for release; and says that the prevailing current of the decisions of other states does not support the position of the New York cases. And Bump on Fraudulent Conv., 428, states that a preference given in consequence of a release is valid.

The clauses of the first class, as above distinguished, depriving the non-releasing creditors of all benefit under the assignments, are almost uniformly regarded as rendering the assignments void. See the citations to the opening sentence of this note.

Notwithstanding the number of jurisdictions in which a release of this nature demanded from the creditors is declared to invalidate an assignment, there are some states wherein such assignments, if otherwise valid, are upheld: *Dockray v. Dockray*, 2 R. I. 547; *Nightingale v. Harris*, 6 Id. 321; *Coakley v. Weil*, 47 Md. 277; *Skipwith v. Cunningham*, 8 Leigh, 271; *Kevan v. Branch*, 1 Gratt. 274; *Gordon v. Cannon*, 18 Id. 387; *Niolon v. Douglas*, 2 Hill Ch. 443; *Le Prince v. Guillemot*, 1 Rich. Eq. 187. And see the article, 8 Am. Jurist, 349; *Halsey v. Whitney*, 4 Mason, 230; *Brashear v. West*, 7 Pet. 608.

where Justice Story and Chief Justice Marshall decided on what they supposed was the weight of authority against their own convictions. In Alabama and in Pennsylvania, the law which was in some doubt for many years, the earlier decisions favoring the validity of assignments exacting releases, was finally settled by statutes declaring them invalid: *Robinson v. Rapelye*, 2 Stew. 86; *Ashurst v. Martin*, 9 Port. 566; *Smith v. Leavitt*, 10 Ala. 92; *West v. Snodgrass*, 17 Id. 549; *Rankin v. Lodor*, 21 Id. 380; Rev. Code of Ala., sec. 1866; *Lippincott v. Barker*, 2 Binn. 174; S. C., 4 Am. Dec. 433, and note, wherein the course of judicial decision in that state is traced.

Even in those states where releases exacted from creditors as a condition precedent to their receiving any benefit, are not considered as vitiating the assignment, there are certain general rules which must be complied with. Such assignment must convey all the debtor's property: *Green v. Trieber*, 3 Md. 11; *Sangston v. Gaither*, Id. 40; *Graves v. Roy*, 13 La. 454; *Henderson v. Bliss*, 8 Ind. 100; *Gordon v. Cannon*, 18 Gratt. 387; *Le Prince v. Guillemot*, 1 Rich. Eq. 187. And in case of an assignment by a partnership, it must convey not only the partnership property, but the individual assets as well: *Insurance Co. v. Wallis*, 23 Md. 173; *Henderson v. Bliss*, 8 Ind. 100; *Gordon v. Cannon*, 18 Gratt. 387. The assignment should not provide for a reserve in favor of the debtor of the shares of the non-releasing creditors: *Trieber v. Green*, 3 Md. 11; *Sangston v. Gaither*, Id. 40; *Hollins v. Mayer*, 3 Md. Ch. 343; *Whedbee v. Stewart*, 40 Md. 414; *Grimshaw v. Walker*, 12 Ala. 101; *West v. Snodgrass*, 17 Id. 549. In Rhode Island, however, such a reservation is valid: *Dockray v. Dockray*, 2 R. I. 547.

INGRAHAM v. WILKINSON.

[4 PICKERING, 268.]

THE PROPRIETORS OF THE BANKS of unnavigable streams have property in the bed to the middle.

ISLANDS IN AN UNNAVIGABLE RIVER, if altogether on one side of the dividing line, belong to him who owns the bank on that side; if formed in the middle of the river they are appropriated to the owners of the bank in severalty according to their original dividing line, the *filum aquæ*, as it is where the waters begin to divide.

TRESPASS for cutting trees and destroying a bridge on an island in a non-navigable stream. The facts are stated in the opinion. Verdict for the defendants by consent.

A. Cushman and Whipple, for the plaintiff.

W. Baylies and Darling, contra.

By Court, PARKER, C. J. The material facts upon which we are to decide this case are that the island in dispute between the parties is situated in Pawtucket river, where it is not navigable for ships or boats, and where the tide does not ebb and flow; that the plaintiffs are owners of a tract of land on the east side of the river extending up and down the river beyond

the islands, and that the defendants are owners of a similar tract on the west side of the river; that the island is not held by any separate grant by either, nor does any other person claim it by virtue of any grant or by possession; and that both the plaintiffs and the defendants, and those under whom they severally claim and hold their farms on the main land, have occasionally cut trees on the island, but that no agricultural improvement has been made thereon. In a partition of the estate among the heirs of Ebenezer Bucklin, father of the grantor of the plaintiffs, this island was set off to those heirs in 1766, but it does not appear that any possession was taken or holden under the partition, except the occasional cutting of wood for forty or fifty years past. It appeared also that the defendants, or those under whom they claimed, had cut wood on the island for thirty years past at pleasure, without any objection having been made by those who held under Bucklin.

It is obvious, from this statement, that neither the plaintiffs nor the defendants had obtained such exclusive possession of the island, or any part of it, as would enable either to maintain trespass against the other, without referring their possession to some title; and it is equally obvious that no title appears in either, except what may be derived from their property in the land on either side of the stream or river opposite to the island; and thus we are obliged to consider the rights of those who own the land on the banks of the stream or rivers not navigable. And this depends altogether, we think, upon the principles of the common law, there being no statute of this commonwealth, or of the province, nor ordinance of the colony, which alters the common law in this respect, except in relation to the fisheries, which, having from the beginning been made the subjects of legislative care, must be governed by such rules and regulations as the several legislatures have established.

The common law recognizes an important distinction as to the use of waters, and the property of the soil between rivers or waters navigable, and those which are not navigable. The former invariably and exclusively belong to the public, unless acquired from it by individuals under grant or prescription. The latter are held to belong to those whose land borders on the waters; so that they have the exclusive right of fishing in front of their own land, and have a property in the bed or soil of the river under the water, subject, however, to an easement or right of passage up and down the stream in boats or other craft, for purposes of business, convenience or pleasure. This

is called in the civil law a servitude which is quite consistent with the right of property. The text-book from which this common law principle is most generally deduced, is Sir Matthew Hale's celebrated treatise, *De Jure Maris*, published in Hargrave's Law Tracts, p. 37; on recurrence to which it will appear that Hale referred to the ancient British writer, Bracton, for the foundation of his doctrine, and that he also relied upon the Roman civil law as compiled in the digest in the reign of Justinian: See Dig., lib. 41, tit. 1, *De acquirendo rerum dominio*, leg. 7, 12, 29, 30, 38, 56, 65, and perhaps many others.

This public right in navigable rivers and the soil or flats under them is changed by the colonial ordinance of 1641, which goes to the proprietors of upland bordering on such places, the property of the soil down to the channel, unless it exceed the distance of one hundred rods, reserving still, however, to the public the right of passage over the water. But according to judicial constructions of this ordinance, these flats may be occupied by wharves or other erections, provided the passage to lands above is not thereby too much straitened or obstructed: *Anc. Charters*, etc., 148. There appears, however, to be an important difference between the common and civil law, in regard to the rights of the public and individuals, on this subject. By the former it would seem that the right of the king or the public is limited to those places where bays, coves, inlets, arms of the sea or rivers, in which the tide ebbs and flows, this being the definition of navigable waters; whereas by the civil law, all rivers properly so called, even above tide-waters, provided they are navigable by ships or boats, or perhaps any other floating vehicle, are considered as public property; and so is the French law, as will appear by the Code Napoleon, liv. 2, tit. 1, c. 3, art. 538, in which are enumerated, among other subjects of public domain, *les fleuves et rivières navigables ou flottables*, which last words seem to have been coined to comprehend all streams on which boats, rafts, lumber, or any other species of property, may be transported. It is probable that this distinction arose from the difference in magnitude between the rivers on the continent and those on the island, many of the former being navigable much beyond the ebbing and flowing of the sea, and few, if any, of the latter, being of consequence for passage or transportation above the tide.

The common law right of public property, restricted, as it seems to be, except for easement or right of way, may be found very inconvenient in its application, to many of the mag-

nificent fresh water rivers of the United States, which are navigable for small vessels and boats much above the flux of the tide, especially by the aid of steam power so rapidly getting into use. And on this account it has been decided by the supreme court of Pennsylvania that the public right to the bed of the river Susquehanna is the same as it is to the ports, harbors, etc., upon the sea; so that the proprietor of the banks could not extend his claim of property *usque ad filum medium æquæ*, as by the common law he would have the right: *Carson v. Blazer*, 2 Binn. 475 [4 Am. Dec. 463]. But the supreme court of New York felt themselves bound by the common law, and adjudicated accordingly in the cases reported in 17 Johns. 211, and 20 Id. 90; *Hooker v. Cummings* [11 Am. Dec. 249]. And in a question relating to the fishery in the river Connecticut, one of the largest in the eastern part of the United States, the supreme court of Connecticut adopted the principles of the common law in regard to the extent of the property of borderers upon the river down to the *filum æque*, or middle of the river: *Adams v. Pease*, 2 Conn. 481. In this commonwealth the question has not directly arisen, except in regard to the fisheries, which are held to be the exclusive right of the owners of the banks of rivers, unless otherwise appropriated by the acts of the legislature, this right being according to our common law, held subject to the control of the legislature, unless by particular grant or prescription, it has been held free of that control.

With respect to the river now in question, however, and the part of it where the island in controversy is found, which is above tide waters, and which, we have a right to presume, is not navigable even for boats, we think it clear that the common law doctrine applies, giving to the proprietors of the banks the property of the bed of the river *usque ad filum medium æquæ*. The question then arises to whom belongs an island formed by a division of the waters of a river, where, but for the island, the borderers on the river would meet each other in the middle of the river; and this question must be settled by analogy to cases of a similar nature, which, though they may have arisen in other countries under the jurisdiction of the civil law, have nevertheless been adopted by the common law as fairly coming within its general principles.

The doctrine of alluvion and its consequences seems to be very clearly settled. That which is formed by gradual accretion, belongs to the owner of the soil to which it adheres. The land which may be separated from a man's farm by a sudden

change of the bed of the river may be reclaimed by him who lost it. Islands formed in the river, if altogether on one side of the dividing line, the *filum aquæ*, belong to him who owns the bank on that side; if formed in the middle of the river, they are appropriated to the owners on each side, not in common, but in severalty, according to their original dividing line, the *filum aquæ*, as it is where the waters begin to divide. Such is the civil law, and the justice of this appropriation can not be questioned. "If the *filum aquæ* divides itself, and one part take the east and the other the west, and leave an island in the middle between both *fila*, the one half will belong to the one lord, and the other to the other:" Hargr. Law Tr. 37.

So, by the civil law, Dig., lib. 41, tit. 1, sec. 29: "*Inter eos qui secundum unam ripam prædia habent, insula in flumine nata, non pro indiviso communis fit, sed regionibus quoque divisis; quantum enim ante cujusque earum ripam est (tantum), veluti linea in directum per insulam transducta, quisque eorum in eo habebit certis regionibus.*" Although this seems applicable to several owners on the same side of the river, yet the principle must be the same when applied to the owners of the opposite sides; for it treats the river as to the question of property in its bed, in the same manner as if no island were there. And so the compilers of the Napoleon Code consider it, who, without doubt, in most of that code, had reference to the civil law. Article 561 of the Code Napoleon, tit. 2, c. 2, is in these words. "*Les îles et atterrissements qui se forment dans les rivières non navigables et non flottables, appartiennent aux propriétaires riverains du côté où l'île s'est formée; si l'île n'est pas formée d'un seul côté, elle appartient aux propriétaires riverains des deux côtés, à partir de la ligne qu'on suppose tracée au milieu de la rivière.*" Although these wise provisions seem to be confined to the case of islands recently formed, the same reason will extend them to the case of islands, the origin of which can not be traced, unless the property in them has been otherwise appropriated according to the rules of law; for whether originally formed by deposits from the water, or by a sudden division of the river, would seem to be immaterial, unless the owner of one side should be able to show that it was created by a disruption from his land.

According to these principles, therefore, this island belongs in severalty to these borderers on each side of the stream, if their lands on the main are co-extensive with the island; if not, then the owners of the next adjoining lots will have a right to claim a portion of the island conformable to their lines. And

this settles the present case in favor of the plaintiffs, for it appears that the bridge removed extended from their land to the island; the removal of it, therefore, was a trespass. But in regard to the trees cut down, it is not shown on which part of the island they stood; so that whether they belonged to the plaintiffs, or to the defendants, does not appear.

The verdict, being for the defendants, must be set aside, and a new trial granted.

APPROVED in *Pratt v. Lamson*, 2 Allen, 284; *Hopkins' Academy v. Dickinson*, 9 Cush. 548; *Commonwealth v. Alger*, 7 Id. 97. In the decision from 9 Cush. 548, the principal case is referred to as the leading authority in that state on the subject of ownership in non-navigable streams, and the following intelligible interpretation given of what *Ingraham v. Wilkinson* decides: "It recognizes the rule of the common law, that the property in the soil of rivers not navigable, subject to public easements, belongs to those whose lands border upon them; and from this right of property in the soil in the bed of the river the court deduce the right of property in an island which gradually arises above the surface and becomes valuable for use as land. Assuming the thread of the river as it was immediately before such island made its appearance, this rule assigns the whole island, or bare ground formed in the bed of the river, if it be wholly on one side of the thread of the river, to the owner on that side; but if it be so situated that it is partly on one side and partly on the other of the thread of the river, it shall be divided by such line and held in severalty by the adjacent proprietors."

TENNEY v. PRINCE.

[4 PICKERING, 385.]

AN INDORSEMENT IN BLANK before the maturity of a negotiable note, by one to whom the note was not transferred, will create the liability of a guarantor upon proof of a legal consideration.

ASSUMPSIT against the defendant upon his indorsement of a note made by one Pierce to the plaintiff. The note was dated December 1, 1820, and was payable in one year. The indorsement was in blank made nine months after the note, and was filled up by the plaintiff as follows: "Eastport, December 1, 1820. For value received I promise to pay Perley Tenney or order the within sum, being eight hundred and twenty-four dollars and sixty-five cents, in twelve months from date, with interest after six months." A verdict was taken for the plaintiff, subject to the opinion of the court.

Moseley, for the defendant, contended that this was a collateral promise and void for want of consideration.

J. Pickering and Marston, contra, cited *Hunt v. Adams*, 5 Mass. 358 [4 Am. Dec. 68]; *Moies v. Bird*, 11 Id. 436 [6 Am. Dec. 179]; *Ulen v. Kittredge*, 7 Id. 233; *Knight v. Crockford*, 1 Esp. 190; *Tillman v. Wheeler*, 17 Johns. 326.

By Court, PARKER, C. J. This case presents a question which has not yet been decided in this commonwealth, nor does it appear that the researches of counsel have discovered any precedent for us in the reports of any other court. By the facts agreed it appears that the defendant put his name on the back of the note about nine months after its date, and three months before it became due. There is no evidence of the intent and purpose of this act of the defendant, nor of any consideration which moved him to it. The writing made by the plaintiff over the signature would make it an original promise, of the same date with the note, to pay the contents of the note according to its tenor. We do not think there was any authority in the plaintiff to make this use of the signature, because it is inconsistent with the circumstances under which the signature was given. It is impossible to infer an original promise to pay this note, coeval with its date, from a signature put upon it, nine months after.

The case of *Ulen v. Kittredge*, is no authority for it; for in that case Kittredge was charged as guarantor, and there was a consideration in forbearance towards the promisor, and the court inferred from the act and declarations of Kittredge an authority to make him thus liable, the note being due when the indorsement was made. Nor does the case of *Moies v. Bird* [6 Am. Dec. 179] support it, for though the signing of Bird was two or three days after the note was made, there were facts from which an agreement to be responsible from the beginning was justly inferred. These two cases approached nearer to the one before us than any which have been cited from our books, but they do not reach the present case, for this is a naked indorsement without any accompanying facts or declarations tending to explain the act. The principle by which all our decisions have been regulated, from the case of *Josselyn v. Ames*, 3 Mass. 274, downwards, is, that where the indorsement is made at the time of making the note, the person indorsing the note is to be treated as an original promisor, and this because he is supposed to participate in the consideration, that is the payee, is supposed to have parted with something valuable upon the strength of the liability of the party who puts his name on the note, and

as such party cannot be answerable as an indorser, he shall be answerable as an original promisor. This is well understood to be the law of this commonwealth, and we do not feel disposed to change it. No authority has been produced from this or any other state or country which would justify us in extending the liability of these anomalous indorsers. We can not yield to the suggestion of counsel that the blank signature gives authority in this case to refer the effect of the signature to the date of the note, because it was proved that that signature was given nine months afterwards, and we have no facts to justify such a reference.

But this signature is not without effect, as it was intended as security to the plaintiff, and it ought to avail as intended. The only form of engagement which is consistent with the time and circumstances under which the signature was made is a guaranty of the payment of the note when it should become due; and that is a contract which may be enforced if it was made on legal consideration, and not otherwise. If within the statute of frauds it is sufficiently in writing with the engagement to that effect, which the plaintiff is authorized to place over the signature, to be sustained. But whether within the statute or not, it can not avail the plaintiff, without proof of consideration, because it is a collateral, not an original, undertaking. We think the signature conveys the authority to superscribe this engagement, as was decided in 1801, in a case reported in a note to *Precedents of Declarations* (2 ed.), 150, afterwards in *Josselyn v. Ames*, *Ullen v. Kittredge*, and many other subsequent cases.

The action in its present form, therefore, can not be maintained; but if it is supposed that a consideration can be proved, the plaintiff has leave to amend his declaration and his indorsement over the signature, and a new trial is granted.

Followed in *Union Bank v. Willis*, 8 Met. 507; *Stone v. White*, 8 Gray, 593, 596; *Green v. Shepherd*, 5 Allen, 591; *Ellis v. Clark*, 110 Mass. 392.

STONE v. SWIFT.

[4 PICKERING, 389.]

AN ACTION FOR A MALICIOUS PROSECUTION will not lie against one who, pursuant to advice of counsel sought in good faith, commences an action, believing that he has sufficient cause therefor.

AN ALLEGATION THAT A SUIT WAS MALICIOUSLY COMMENCED will not be supported by evidence which shows that the defendant brought his action, believing that he had good cause therefor, but detained property attached, after learning that his suit was groundless.

A BILL OF LADING UNINDORSED and sent to one in a letter, containing no words of transfer, it being for the delivery of goods to "A. or his assigns," will not support an action by the holder, either as assignee or surviving owner. And the delivery of a part of the cargo will not estop the owner of the vessel from denying the plaintiff's title to the residue.

ACTION for a malicious civil suit. Plaintiff alleged that he was the owner of a certain vessel on board of which was a lot of ivory, by a bill of lading stipulated to be delivered to John H. Swift or his assigns, at Boston; that on his arrival in the United States, the defendant, without any right or color of title, demanded the ivory of the plaintiff, and upon his refusal to deliver it, maliciously intending to harass and vex the plaintiff, commenced a suit against him, and attached the vessel and her cargo, and detained the same three months, to the plaintiff's injury, etc. Another count was to the same effect, alleging that the plaintiff was always ready to deliver the ivory to J. H. Swift or his assigns upon the payment of freightage, but that the defendant demanded the ivory without having first paid or offered to pay the amount of freightage, and without any just cause therefor, and maliciously intending to injure the plaintiff commenced a suit, etc. Upon the general issue a verdict was found for the plaintiff. The defendant moved for a new trial on the grounds that he had competent authority to claim the ivory and bring an action for its non-delivery, because: 1. He himself had paid for the property by an outward cargo and was the sole survivor of those concerned in the property with him; 2. He was the assignee of the bill of lading by virtue of its delivery to him, and a letter of J. H. Swift accompanying it; 3. He was the heir at law of J. H. Swift, his son; and, 4. Because the plaintiff, having delivered part of the merchandise on board, to the defendant without objection, was estopped to deny his right to the ivory.

Plaintiff's counsel moved an instruction that if the defendant believed he had a cause of action when he commenced the suit, but afterwards being advised by a Mr. Warren that he had no sufficient cause, nevertheless detained the plaintiff's property, and suit was in fact groundless, then this action was made out. Mr. Warren's deposition was read, from which it appeared that after the suit complained of was instituted, the defendant applied to him for advice, and he, Mr. Warren, learning that the bill of lading had never been formally assigned to the defendant, advised him immediately to discontinue proceedings, and take out administration on the estate of his son, J. H. Swift.

PUTNAM, J., who tried the cause, reported that there was no evidence that the defendant, Asa Swift, was the sole heir of J. H. Swift; that he instructed the jury that the defendant had not by law a right to maintain an action in his own name for the property mentioned in the bill of lading, as surviving owner, or as assignee in virtue of the delivery of the bill of lading; and that the delivery of part of the property mentioned in the bill of lading did not amount to a waiver of the plaintiff's right to contest the defendant's authority to maintain the action in his own name for the residue. In regard to the plaintiff's motion, the judge instructed the jury, that if Swift, at the time he purchased his writ against the plaintiff knew that he had no cause of action whatsoever, the law would imply that he acted maliciously; but that if he believed that he had a just and legal claim against the plaintiff, and procured his writ of attachment for the purpose of enforcing it by lawful process, he was not liable to this action, because the form or kind of action on his suit was mistaken by his counsel, or because on trial he should fail to support his suit; that the facts proved in the deposition of Mr. Warren might be taken into consideration in connection with the other testimony tending to prove that the defendant knew that he had no cause of action when he commenced his suit and acted maliciously; but that those facts alone would not warrant the jury in finding a verdict for the plaintiff, if upon the whole evidence they believed that the defendant supposed he had a just and legal cause of action when he sued out the writ, and that his action was commenced for the purpose of enforcing it, and not maliciously to vex and oppress the plaintiff.

J. Pickering and Saltonstall, for the defendant.

Cummins and Shillaber, contra.

By Court, PUTNAM, J. All the counts of the plaintiff's declaration are grounded upon the allegation that the defendant Swift knew he had no lawful cause of action against the plaintiff Stone, when the action was commenced; but that he acted maliciously in commencing it without any just cause, and also in attaching and detaining Stone's property. The court are all of opinion that this action can not be supported, unless the evidence be satisfactory that Swift knew, when he commenced his action, that he had no cause of action, and that he acted maliciously in that behalf, and that the instruction to the jury, as to the effect of the deposition of Mr. Warren upon this action, was correct.

The gravamen set forth in the plaintiff's motion is altogether different from that set forth in all the counts; it admits that Swift believed he had a just cause of action when he sued, and proceeds upon the ground of an unreasonable detention afterwards. The court are clearly of opinion that such evidence will not maintain the action in its present form.

If there had been a count admitting that Swift supposed he had a good cause of action when he commenced his suit, but afterwards ascertained that he had not, and after that continued his attachment maliciously, and with a view to vex and oppress, he then knowing he had no just cause of action, it would have presented a very different inquiry to the jury from that which was submitted to them; but, as has been observed, all the counts are founded upon the knowledge of Swift, that he had no just cause of action when his suit was commenced. Upon considering the evidence in the case, the court do not perceive that the jury could properly have found that to be the fact. It appears that Swift acted upon advice of counsel. If he did not withhold any information from his counsel, with the intent to procure an opinion that might operate to shelter and protect him against a suit; but, on the contrary, if he, being doubtful of his legal rights, consulted learned counsel, with a view to ascertain them, and afterwards pursued the course pointed out by his legal adviser, he is not liable to this action, notwithstanding his counsel may have mistaken the law.

This seems to be considered as the known rule in such actions, and it is recognized in *Ravenga v. Mackintosh*, 2 Barn. & Cres. 693. This action was for a malicious arrest. Ravenga made a contract for the Columbian government with the defendant. He obtained an opinion of counsel, that the Columbian government was liable; that Ravenga was liable as a member of it, and that he could not maintain an action against Mackintosh, if it should turn out that Ravenga was not personally liable; but the jury found, as Bayley, J., said, there was abundant reason to believe that Mackintosh did not act *bona fide*, and did not believe that he had any good cause of action.

Now, we all think that this point of the case was not so distinctly presented to the jury at the trial as it ought to have been, and a new trial is directed for that cause. The other causes for a new trial are not sustained. Upon the new trial the jury will settle the fact, whether Swift acted *bona fide* in regard to the consulting of counsel, and believed that he had a good cause of action, and honestly pursued the advice and direction of his

legal adviser, or otherwise. If he did, this action can not be supported; if he did not, it may be maintained, and the jury will assess the proper damages.

New trial granted, with liberty to amend the declaration on payment of costs.

Followed in *Wilder v. Holden*, 24 Pick. 11; *Olmstead v. Partridge*, 16 Gray, 383.

MALICIOUS PROSECUTION—ADVICE OF COUNSEL.—See *Frowman v. Smith*, 12 Am. Dec. 265.

MALICIOUS PROSECUTION IN CIVIL SUITS.—See *Williams v. Hunter*, 14 Id. 597 and note.

BAGLEY v. WHITE.

[4 PICKERING, 395.]

ATTACHING GOODS PREVIOUSLY ATTACHED.—Where an officer does not retain possession of the goods attached by him, his lien will not be preserved against an attachment by another officer.

TROVER for certain goods in which, the plaintiff alleged, he, as a deputy sheriff, had a special property by virtue of an attachment at the suit of certain of the creditors of Bartlett, and which, it was further alleged, had been taken from his possession by the defendant, another deputy sheriff, upon attachments sued out by other creditors of Bartlett. It appeared that Bartlett had two stores, one in Newburyport, and the other in Amesbury; that White attached the stock in the Newburyport store, and left the same in the possession of Pierce, Bartlett's clerk, under a written authority as keeper; that Bagley attached the goods in the Amesbury store, and at Bartlett's request had them removed to his store in Newburyport, to save expense, but that Bagley did not come to look at them from the day they were carried there until after they were attached by White, and did not appoint any keeper of them; that Pierce testified that he never considered himself as having any control over these goods; and that some thirty or forty days after Bagley's attachment, White attached the goods which had been removed to the Newburyport store, at the suit of another creditor of Bartlett. Prior to this last attachment, White asked if the goods were not the same that Bagley had attached, and was answered in the affirmative.

The cause was submitted for the opinion of the court, whether the facts would support the action.

Cummins and Gerrish, for the plaintiff, contended that the notoriety of an attachment was sufficient to preserve the lien. They cited *Baldwin v. Jackson*, 12 Mass. 131; *Train v. Wellington*, Id. 495; *Gale v. Ward*, 14 Id. 352 [7 Am. Dec. 223]; *Bridge v. Wyman*, Id. 190; *Gordon v. Jenney*, 16 Id. 464; *Denny v. Warren*, Id. 420.

Marston and Shillaber, contra, cited *Lane v. Jackson*, 5 Mass. 157; *Watson v. Todd*, Id. 274; *Lyman v. Lyman*, 11 Id. 319; *Vinton v. Bradford*, 13 Id. 116 [7 Am. Dec. 119]; *Knap v. Sprague*, 9 Id. 261 [6 Am. Dec. 64].

By Court, PUTNAM, J. We have examined the authorities and considered the arguments adduced by the counsel for the plaintiff, with a desire to support the attachment which he made, and which, it seems to us, he did not intend to abandon; but we are all satisfied that the lien originally created has not been continued.

The general rule is well known that the officer must have the possession of the goods attached actually or constructively; and that doctrine is found in all the cases cited for the plaintiff. In *Baldwin v. Jackson*, the furniture attached was delivered to a person to keep for the officer, and while in the hands of the keeper the second attachment was made, after notice. So, in *Train v. Wellington*, and *Vinton v. Bradford* [7 Am. Dec. 119], the second attachment was made by one officer while the goods were in the actual custody of another, and the first who attached them. So, in *Gale v. Ward* [7 Am. Dec. 223], the attachment was incomplete, because the machines attached were not removed, nor put into the hands of a keeper, to give notice to any officer who should afterwards come to attach them. In *Bridge v. Wyman*, a ship attached permitted to be in the visible possession of the debtors, and a nominal delivery only was given to Coffin, the servant of the attaching officer, and no notice was given to the officer who made the second attachment; and the first was held to be a mere nominal attachment. In the case at bar, the plaintiff seemed to think that he should not want any keeper, and that the goods would be safe in the debtor's store, where they were put after they were attached. That would have been sufficient if the plaintiff had kept the key. But he had not the key, nor any control of the shop, nor any possession by any one as his servant, for thirty or forty days after the goods were put there. On the contrary, the debtor had the actual possession of the store in which the goods were put, and paid the rent for it.

But it is contended that the defendant knew that the plaintiff had attached the goods, and so the attachment should be considered to be void as against him. All the evidence upon this point is, that the defendant knew that some thirty or forty days before the plaintiff had attached the goods, and that they had been afterwards in the possession of the debtor as has been before stated. The inference to be drawn from those facts is matter of law, and is the subject of this inquiry. If it should be that the lien originally created had been continued, then the defendant might be said to know that the goods were under attachment; but if not, then it could not be said that he knew they were. The facts would rather warrant the assertion that the defendant knew that the attachment which had been made had for some reason or other been discharged than that he knew the original attachment subsisted when he undertook to attach.

We regret that an old and faithful officer should make such a mistake, and hope that he may not eventually suffer; but however that may be, we are bound to administer the law as we find it. The plaintiff must be nonsuited.

WHITWELL v. VINCENT.

[4 PICKERING, 449.]

GOODS SOLD ON CONDITION that security for the purchase-price shall be given do not pass absolutely to the vendee, where such security is not given, although the goods were removed by the vendee without objection. **IN SUCH CASE**, if the vendee sell the goods and take a negotiable note, which he transfers to a creditor having full knowledge of the facts, an action of **assumpsit** will not lie by the original vendor against the creditor, the note being unpaid, as such a form of action is an affirmance of the sale.

ASSUMPSIT for money had and received, goods sold and delivered, and on the other money counts. The plaintiffs' auctioneers sold to Bryant forty hogshead of gin, on condition that he should give a note payable in four months, with a sufficient indorser. Bryant, with plaintiffs' knowledge, and without any objection on their part, removed the gin to his store. At the time of the removal plaintiffs' clerk told Bryant that if his indorser should not be sufficient, he must furnish another. An indorser was given, but objected to by the plaintiffs, and nothing further was done, and no note given. Defendant, Vincent, was the rejected indorser. On the day of the sale to

Bryant he sold some of the gin and took his vendee's note therefor. This note was indorsed to Vincent, a creditor of Bryant, with full knowledge of the facts. One of the plaintiffs, Bond, subsequently demanded the gin of Bryant, who returned what had not been sold; and then Bond demanded of Vincent the note which he had received. Vincent refused to deliver the same, and received the amount of the note from the makers after this action had been commenced. Verdict for the plaintiffs by consent.

W. Simmons, in support of the verdict. The property in the gin was not changed, the condition of the sale not having been waived or performed: *Hussey v. Thornton*, 4 Mass. 405 [3 Am. Dec. 224]; *Spring v. Coffin*, 10 Id. 31; *Marston v. Baldwin*, 17 Id. 606; *Palmer v. Hand*, 13 Johns. 434 [7 Am. Dec. 392]. Where one has goods, or the money of another which he has no right to retain, assumpsit will lie for their recovery: *Cummings v. Noyes*, 10 Mass. 436; *Mason v. Waite*, 17 Id. 563.

Morey and H. H. Fuller, contra.

By Court, WILDE, J. This is an action of assumpsit, brought to recover the proceeds of sale of four hogsheads of gin, alleged to be the property of the plaintiffs. The gin was sold by them to one Bryant, on condition of his giving security for the purchase-money. The security was not given, but the defendant contends that there was an absolute delivery of the property after the sale, amounting in law to a waiver of the condition. But it is quite apparent, from the evidence reported, that the plaintiffs did not intend to waive their security; on the contrary, the performance of the condition was insisted on by their clerk at the time of the delivery, and the vendee acquiesced. It is not necessary, in order to make the delivery conditional, that an express declaration should be made to that effect at the time of delivery. It is sufficient if enough appears to show that such was the understanding of the parties. We are, therefore, of opinion on this point, that the property of the goods in question was not divested by the conditional sale.

We are also of opinion that as Bryant has since sold the goods and received payment by a promissory note of hand, the plaintiffs may waive the tort and maintain assumpsit against him for the proceeds of sale. It does not appear, by the report, that the note given to Bryant was negotiable, but it has been treated as such by the counsel in the argument. It is not,

however, material to inquire as to this point, because the defendant had no concern or agency in the sale made by Bryant. All that appears to charge him is, that he received the note taken by Bryant as security for a debt, and that on demand, made by the plaintiffs, he refused to deliver it over to them.

This refusal is the only ground of liability on which the plaintiffs can maintain their action. For it can not be pretended that without a demand the plaintiffs could maintain an action against the defendant in any form. And it seems also to be equally clear that they can not, in an action of assumpsit, avail themselves of the liability, if any there be, arising from the demand and refusal. If the note demanded may be considered as the property of the plaintiffs (as to which, however, we give no opinion), then the refusal to give it up was a tort, and if the plaintiffs waive the tort they thereby waive also their right of action. This appears to be an insuperable difficulty to the plaintiffs' recovery in this form of action. If the plaintiffs had a right to demand the note they may maintain trover. Or if the defendant had sold the note they might maintain this action by waiving the tort. So, also, as the defendant has received payment of the note in question since the commencement of the present suit a new action against him might be maintained, either in the form of assumpsit or of trover, unless he could show that the note was the property of Bryant, and that the plaintiffs' remedy is only against him, or by pursuing the goods into the hands of the person to whom Bryant sold them. These, however, are questions which are not raised in the present case.

The cases cited by the plaintiffs' counsel do not support them. In the case of *Floyd v. Day*, 3 Mass. 403 [3 Am. Dec. 171], the defendant was the plaintiff's agent to collect for her a demand she had against one Pilsbury. Day received in payment a promissory note which was indorsed to him; and the court held that he was liable to the plaintiff in assumpsit, he having discharged the demand against Pilsbury. In the case at bar, the defendant has never acted as the plaintiffs' agent. He has neither discharged nor compromised any demand due to them, nor was it competent for him so to do. So that the principles laid down in *Floyd v. Day*, do not apply.

The case of *Oughton v. West*, 2 Stark. 321, was also a case of agency. The defendant had undertaken to get a bill of exchange discounted for the plaintiff, and had passed the bill to a creditor in discharge of his own debt. It was considered that

this was a discounting of the bill, and that he was liable in the same manner as he would have been if he had received the amount in money. We can perceive no bearing that this case can have upon the one under consideration.

Upon the whole, whatever equity there may be in the plaintiffs' claim, it is, we think, clear that this action can not be maintained.

Verdict set aside and plaintiffs nonsuit.

Followed in *Sawyer v. Spofford*, 4 Cush. 599; cited in *Coggill v. Hartford etc. R. R. Co.*, 3 Gray, 547; and in *Atlantic Bank v. Merchant Bank*, 10 Id. 547.

SALES OF PERSONAL PROPERTY ON CONDITION that the title shall not vest in the vendee until the happening of a specified event: See *Barrett v. Pritchard*, 13 Am. Dec. 449, and note.

JONES v. BOSTON MILL CORPORATION.

[4 PICKERING, 507.]

THE SUPREME COURT OF MASSACHUSETTS, under the statute of 1817, c. 87, has chancery jurisdiction co-extensive with that exercised by the court of chancery of England, so far as is consistent with the constitution and laws of the commonwealth.

THIS COURT MAY RENDER A DECREE against a corporation, and enforce it by a *distringas*, sequestration, or other form of process necessary to carry the decree into execution.

SPECIFIC PERFORMANCE OF AN AWARD, made pursuant to a voluntary submission of the parties in writing, may be decreed, although there may have been no acquiescence in the award, or part performance of it.

AN AWARD DIRECTING THE EXECUTION OF RELEASES may be specifically performed in equity.

BILL in equity for the specific performance of an award. The opinion states the case.

Davis, Solicitor-general, and Prescott, in support of a demurrer to the bill. A bill in equity for the specific performance of an award made pursuant to a voluntary submission will not lie where there has been no acquiescence in, or subsequent agreement to have it executed: Bac. Abr., Arbitrament, H. I.; *Thompson v. Noel*, 1 Atk. 62; 1 Eq. Cas. Abr. 51; *Cooth v. Jackson*, 6 Ves. 34; Kyd on Awards, 318, *et seq.*; Com. Dig. Chancery, K. 1; *Hall v. Hardy*, 3 P. Wms. 187; Dickens, 66. In this commonwealth a decree of specific performance cannot be enforced against a corporation: 1 Newl. Ch. Pr. 388 *et seq.*; *Nichols v. Thomas*, 4 Mass. 232; *Riddle v. Proprietors etc.*, 7 Id. 186 [5 Am. Dec. 35].

Sullivan and Nichols, contra, cited 1 Madd. Ch. Pr. 362, 401, 468; *Wood v. Griffith*, 1 Swanst. 43; 1 Fonbl. 30, 31; *Harnett v. Yielding*, 2 Sch. & Lef. 553; *Blundell v. Brettargh*, 17 Ves. 241; 2 Pow. on Contr. 38, 56, 136; 2 Com. on Contr. 557; Com. Dig. Chancery, 2 K. 1, 2 X. 1, 2 X. 6; *Furnival v. Crew*, 3 Atk. 87; Cooper's Eq. Pl. 133; *Dwight v. Pomeroy*, 17 Mass. 327 [9 Am. Dec. 148].

By Court, PARKER, C. J. This is a bill in equity praying a decree to enforce the specific performance of an award, made pursuant to a submission by the parties in writing under seal, in the form of an agreement or covenant, with a penalty for the non-performance by either party. The submission or agreement to submit, relates to a controversy respecting the title and boundaries of a lot of land or flats, situated upon or in the mill-pond, and claims of damages which the plaintiff set up against the defendants for the appropriation of part of the land for streets, for which the defendants had become answerable by virtue of a contract with the city of Boston, and also damages for the diversion, interruption, or destruction of a water avenue from this land to the bay or river, which formerly existed.

Considering the state of the property, title, and possession of the land, the condition of the parties in relation to it, and the effect of the alterations in that part of the city, whereby a large basin or pond of salt water had been converted into streets and sites for building and business, there certainly could be no more suitable subject of arbitration; and the very judicious choice of arbitrators would seem to have promised an acquiescence in the result of their investigation and deliberation upon the subject. But one of the parties has declined executing the award, by which the title to a specific portion of the land is confirmed to the other, and a deed of release thereof awarded; and the party who prevailed to this extent before the arbitrators seek redress from the chancery jurisdiction of this court, conferred by Stat. 1817, c. 87. A demurrer to the title has brought the question before us, whether by virtue of that statute, the court has jurisdiction of the subject-matter of this bill, and the power to enforce, by a decree, the specific performance of this award, so as to direct the execution and delivery of a release according to its provisions.

The power of this court over subjects appertaining to chancery jurisdiction in England, is undoubtedly special and limited, in regard to the objects on which it is to operate, but in relation to such subjects, it is general and unlimited; the legislature

having granted the power without restriction and without any direction as to the manner in which it shall be exercised; thus by necessary implication conferring all the authority and power which is enjoyed or exercised by tribunals which entertain this jurisdiction in England, so far as consistent with the provisions and principles of our constitution and the general laws of the commonwealth. By establishing a court of equity with general jurisdiction, without prescribing the forms of process, or the manner of proceeding, such a court would necessarily adopt the principles and rules of practice of courts of a like character in England, because that always has been the source to which the courts here have been obliged to apply for principles and rules of practice, in all cases in which our legislature have granted judicial power and authority without limiting or prescribing the form, manner and extent in which it shall be exercised.

The statute 1817, c. 87, after specifying the subjects of equity jurisdiction committed to this court, provides that it shall have authority to issue all such writs and processes as may be necessary or proper to carry into effect the powers granted, and to make from time to time all necessary rules and orders for the convenient and orderly conducting of the said business; provided the same be not repugnant to the constitution and laws of the commonwealth. And in regard to process, the court is to be governed by the course of proceedings in the courts of chancery; which, as no such courts existed in this commonwealth, must necessarily refer us for the development and use of the extensive powers thus given to the courts in other states and countries, particularly to those of Great Britain, which without doubt are the prototypes of chancery tribunals in the United States and in the several states wherein such tribunals exist.

There can then be no defect of power to carry into effect any decree of this court upon any subject within its jurisdiction, as given by the statute which first extended the equity power of this court beyond the subject of mortgages. And this answers one of the arguments in support of the demurrer which urged the incompetency of the court to enforce its decrees against corporations, on account of its inability to use such compulsory process as courts of chancery employ in like cases in England. If a *distringas*, sequestration, or other form of process, should become necessary to the due and complete execution of a decree against a corporation, this court is authorized by the statute to devise and issue such process; and there can be no doubt that

in all other respects our corporations are among the most suitable objects for the application of chancery power in such cases as by the statute are brought within this jurisdiction. This was the last of the three points stated as comprising the objections to the jurisdiction of the court in this particular case, but it was convenient to dispose of it first; and I will now proceed to consider the others, which may require more particular consideration. The objection most likely to occur in this early administration of chancery jurisdiction in this court rests upon an express limitation of the powers of the court on one of the subjects committed to its jurisdiction.

The words of the statute are: "The justices of the supreme judicial court shall have power and authority to hear and determine in equity all cases of trusts arising under deeds, wills, or in the settlement of estates, and all cases of contract in writing where a party claims the specific performance of the same, and in which there may not be a plain, adequate, and complete remedy at law." This qualification seems to relate only to the last branch of the power given, and indeed could not well in any case apply to trusts created in the several ways mentioned; for there can not be a remedy at law in any degree suited to those subjects. And in the case of contracts which require from their nature a specific execution, it is clear there can not be a remedy to which either of the characteristics, plain, adequate, or complete, will apply. Without doubt, it was the intention of the legislature in the use of these words to limit the exercise of the power of decreeing specific execution to those cases which were recognized as proper subjects of that power in England.

There a contract for the payment of money, or for the delivery of goods, wares and merchandise, or an award for the payment of money or the delivery of chattels, has not been held to be within this power, or the discretionary use of it, because in such cases the remedy at law in damages for the breach of such contracts is sufficient, and because a specific execution, in most cases, would be attended with inconvenience and sometimes with injury to the party complained of. But with respect to contracts in writing relating to the transfer of real estate, or the making and delivery of deeds relating thereto, it is scarcely possible that the remedy at law, though it may be plain, should be adequate or complete. Damages may be recovered for the breach of such contracts, but there is great uncertainty until they are ascertained by judgment, and then they may fall short of an equivalent; and even if adequate, if the party complaining desires to

be quieted in his title to land in possession, or to become the owner, according to the contract of the other party, he can not be considered as having a complete remedy, except by a specific execution of the contract. A bond, therefore, with condition to convey an estate, or an agreement in writing, or under seal, for the same purpose, is the most suitable and obvious subject of specific execution, and without doubt was among the most prominent objects, in the view of the legislature, for the operation of this new, and no doubt, in many respects, useful and necessary jurisdiction.

The next objection is that which has demanded most of the attention of the court, and about which, from the apparent inconsistency of the authorities cited with each other, there existed considerable reason to doubt. It is stated as a broad and general proposition, that the courts of chancery in England do not entertain bills for the specific execution of awards of arbitrators, but leave the parties to their suit upon their bond or agreement, or to other remedy at common law. If this be so, we should certainly hesitate to support the bill, whatever might be our opinion of the propriety of rejecting this particular subject from equity jurisdiction, for as our authority is given in general terms, with explicit reference to the proceedings of courts of chancery existing elsewhere, we should not take upon ourselves to go beyond the acknowledged and practiced jurisdiction of such courts in a country where this branch of jurisprudence has been so long and so extensively exercised. But upon a scrupulous examination of all the authorities cited, and others which relate to the subject, we are brought to the conclusion that there is no such defect of jurisdiction in the courts of chancery in England as has been stated.

Some of the authorities read by the counsel for the defendants would sustain their proposition, if unexplained, and there would then be a manifest and palpable contradiction between them and those which have been cited in support of the bill by the counsel for the complainant. Generally, the reports of chancery decisions are much less definite and clear than those of the common law courts, and upon the subject of awards the want of precision and clearness is quite remarkable. We think, however, we are able to trace out the true principle which has governed those courts in relation to this subject, and that upon the whole, there is no doubt that the relief prayed for in this bill would be afforded by the court of chancery in England, if there were no solid objections to the award. and in New

York, where the structure and proceedings of this tribunal are almost a fac-simile of the court of chancery in Great Britain.

The first authority cited in defense of the proposition is *Bac. Abr., Arbitrament, etc., H, I.* The passage is cited in these words: "Nor will a bill of equity lie to carry into execution an award on a voluntary submission, unless there has been an acquiescence in it by the parties to the submission, or an agreement afterwards to have it executed." For this the case in 1 *Atk.* 62, is cited, and the words of Lord Hardwicke, as there reported, will certainly justify the position. But on examining the case itself, we find that the objections to the bill were not of so general a nature as the above cited dictum imports. Those who prayed for a specific execution of the award were no parties to the submission, though interested in the award. And the subject of award was the payment of money, which chancery does not enforce, because the remedy is quite as good at law, an execution from a court of common law being fully competent to the enforcement of payment. We think the words imputed to the lord chancellor were restrained by him to the case before him, and that he did not intend to decide that in no case could a bill be sustained to execute an award, unless there were a subsequent acquiescence or agreement to perform it. The case cited from 3 *P. Wms.* 187, shows the loose manner in which chancery cases have been reported. It is stated that upon opening the case, the master of the rolls said he thought it was a strange bill, for which he knew no precedent, and that the plaintiff must sue his bond; but yet, upon further consideration, he sustained the bill, and decreed performance. In a note to the case it is observed that these decrees may not have been usual, because awards are commonly to pay money, in which case a bill is improper; but where the award is to do anything in specie, as to convey an estate, etc., in such case, if the defendant has accepted the money in satisfaction of the conveyance, it is highly reasonable he should make the conveyance. It will be seen that by later authorities this qualification is not insisted on.

The cases cited from 6 *Ves.* 34, and *Dick.* 66, do not appear to have any bearing on the question. In 1 *Swanst.* 54, it is said by the lord chancellor: "That a bill will lie for the specific performance of any award is clear, because the award supposes an agreement between the parties, and contains no more than the terms of that agreement ascertained by a third person; and then the bill calls only for a specific performance of an

agreement in another shape." In 17 Ves. 241, it is said that if the terms of an agreement are to be ascertained, by an award, being so ascertained, that agreement shall be performed in equity. In 1 Mad. Pr. (2 ed.) 401, it is stated to have been held that if one party performs his part of the award, the other party may be compelled in chancery to perform his (cites 1 Ch. 142), and in the very next paragraph it is said: "That a bill will lie for the specific performance of an award is clear;" and the case in *Swanston* is cited. Here there is a manifest discrepancy. The passages may be reconciled by supposing that the court of chancery will execute an award. Though defective in point of law, if one party performs and the other accepts the performance, and that as to all good awards it will decree specific execution; for *Maddock* concludes that part of his subject by stating that though, if the award directs anything to be done respecting lands, the court will decree a specific performance; it will not execute an award for the payment of money.

These latter cases put the subject on its true footing; that is, the specific performance of a contract in writing for the submission is the agreement. It is virtually a contract to do what shall be awarded, and there does not seem to be any reason why it is not as much the subject of equity power as if the contract were complete without the interference of an arbitrator. We have no doubt that where the award is to do a specific thing in relation to real estate pursuant to the agreement of the parties in writing, the award being valid in law, it is subject to the equity jurisdiction of this court within the letter of the statute, without any subsequent assent, express or implied.

And we do not perceive the force of the objections which have been urged. It is said that many exceptions may be taken to the award which can be settled only by a court of law; but it is clear, by all the authorities, that all these exceptions may be taken as well in the court of equity. It is said also that matters of fact may be in dispute, which ought to be settled by a jury; but it may be answered that these matters may always be referred to a jury, this court having the power, when sitting as a court of chancery, to direct an issue to the country whenever the circumstances of the case require such a proceeding. And from the peculiar combination of powers in this court of equity and law, it is less inconvenient than it would be in ordinary courts of chancery to settle matters of law or fact, as the circumstances of the case may require. We do not mean by this to express any favorable opinion of this union of powers, for it is obvious that ere long the accumulation of chancery

business will require a separation; but constituted as the court now is, that objection to its equity jurisdiction, arising from the necessity of determining questions of law as well as of fact, can not have much weight.

On the particular case before us, in which the specific performance of an award, directing the execution of releases, founded on an agreement of the parties in writing, and under seal, is sought for, we are satisfied that the legislature has given this court authority to adjudicate; and we leave open all questions concerning the validity of the award in regard to matters of law or fact, determining only for the present, that an award was authorized, assumed to be good, in point of law, may be the subject of a decree for specific execution without any subsequent act of the parties showing a part performance or acquiescence. The demurrer is therefore overruled, and the defendants are put to their answer to the bill.

Approved in regard to the specific performance of an award, in *Hodges v. Saunders*, 17 Pick. 475; *Stearns v. First Parish in Bedford*, 21 Id. 121; *Penniman v. Rodman*, 13 Met. 384; *Caldwell v. Dickinson*, 13 Gray, 370; *Howe v. Nickerson*, 14 Allen, 406; and upon the remedy for the breach of a contract to sell personalty, in *Jones v. Newhall*, 115 Mass. 248.

PATTEN v. CLARK.

[5 PICKERING, 5.]

CONSIGNMENT FOR SALE, WHETHER FRAUDULENT. — Plaintiff furnished C., an insolvent, with goods to be sold at C.'s shop. The goods were to remain plaintiff's property, and C. was to pay for them at certain prices when the same were sold, and to account with plaintiff for all goods sold at the prices fixed; C. to retain all over such prices as his profit. Goods sold on credit were at C.'s risk, and if any remained unsold, they were to be returned to plaintiff: *Held*, that whether such a consignment was *bona fide* was for the jury to determine, and that the same was not fraudulent in law as to C.'s creditors.

REPLEVIN. Issue joined as to the plaintiff's property in the goods replevied.

At the trial, it appeared that plaintiff furnished one Chanly at different times since December, 1824, with divers goods to be sold by the latter at a retail shop kept by him; that it was agreed between them that the goods should remain plaintiff's property until sold, and if any remained unsold they were to be returned to plaintiff. Chanly was to pay the price marked on the goods when the same were sold; and if sold on credit, the same were at Chanly's risk, and he was at all events to account

with plaintiff at the prices marked. In September, 1823, Chanly took the poor debtor's oath, and prior to said agreement was insolvent. Chanly and wife gave plaintiff a lease of certain tenements belonging to the wife, to secure the performance of the agreement on the part of Chanly. The defendant, as constable, attached the goods in question on June 10, 1826, on a writ against Chanly to secure the payment of a debt contracted in 1822, before Chanly's failure.

The court instructed the jury that if the goods were consigned by the plaintiff to Chanly to be sold on the terms before stated, and were not actually sold to him, the property remained in the plaintiff at the time of the attachment, and the action might be maintained; that such a consignment was not fraudulent in law, especially as to the prior creditors of Chanly; that the case did not present a case of fraudulent sale, but whether any sale had been in fact made.

The jury found a verdict for plaintiff, and defendant excepted to said instructions.

Simmons and Gay, for plaintiff.

Morey and Fuller, for defendant.

By Court, PARKER, C. J. This case was entirely for the jury to determine, and there is not sufficient reason to suppose their verdict was not well founded on the evidence. Whether the possession of the goods by Chanly was by virtue of a consignment by the plaintiff, or a sale, depended altogether upon the question, whether the transaction proved was colorable or genuine. Certainly a person may place property in the hands of a poor man, to enable him to trade with it, and gain a subsistence from the profits, without exposing it to seizure by his creditors. The terms upon which the goods were taken by Chanly, as proved by the plaintiff's witnesses, were consistent with the plaintiff's claim of property in them and a consignment of them to Chanly for sale, and it is equally true that all this may have been only ostensible, while the real purpose was to protect Chanly's goods from his creditors. But it is for the jury alone to distinguish the character of these transactions, and they having pronounced them to be honest and fair, there is no legal ground for the court to interfere.

Judgment according to verdict.

See *Barrett v. Pritchard*, 13 Am. Dec. 449, note 451, and *Whitwell v. Vincent*, ante, 355, as to the title to goods remaining in the vendor after delivery.

CHESTERFIELD MANUFACTURING Co. v. DEHON.

[5 PICKERING, 7.]

ASSIGNMENT FOR BENEFIT OF CREDITORS DOES NOT TRANSFER FUNDS HELD AS FACTOR OR TRUSTEE.—An assignment for the benefit of creditors does not transfer the property held by the assignors as factors, nor any proceeds derived from a sale of such goods, and the consignors may pursue such goods, or the price of them, notwithstanding such assignment.

A CUSTOM OR USAGE AMONG FACTORS, to mix in one parcel the goods of different consignors, and upon a sale of the same to charge the purchaser with the same, and in some cases to take negotiable notes therefor, and negotiate the same as their own property, and in case of the failure of the purchaser to charge the consignor with the debt as a bad debt, was held not to prevent a recovery by a consignor who could trace his goods, or the proceeds thereof, in the hands of the factor or his trustee.

ASSUMPSIT for money had and received. Plaintiffs consigned goods to James Vila & Co. for sale on commission. The goods were mixed with those of other consignors and sold to divers persons, notes payable to Vila & Co. or order, being taken in payment in some instances, and in others the goods were charged to the purchasers. The defendants, as assignees of Vila & Co., received on accounts thus charged, on account of goods sold for the plaintiffs, two hundred and seventy-five dollars, and on promissory notes taken as above mentioned, two hundred and sixteen dollars. It appeared that it was the custom of commission merchants or factors to mix the goods of different consignors and to charge the same, or to take notes therefor as above mentioned, and to negotiate such notes for their own benefit, as their own property, and in case of failure of the purchaser to charge the consignor with the debt as a bad debt. That the notes were not claimed or given up to the consignors, the number interested in a single note rendering it impracticable. That accounts were kept with each consignor, he being charged with advances, bad debts, etc., and credited with amount of sales. Vila testified that he believed that plaintiffs had notice of such usage and assented to it. Vila & Co. failed and made an assignment to the defendants in trust to pay their creditors. The assignment contained a covenant not to sue and a release of all demands, and was executed by plaintiffs before the commencement of their suit. The amount of plaintiffs' demand was contained in a schedule annexed to the assignment, and was also included in the notes and accounts mentioned in said schedule.

Defendants offered the assignment in evidence to show that

plaintiffs treated Vila & Co. as their debtors for the sum they now claimed of the defendants and had released the same.

Verdict for plaintiffs, subject to the opinion of the whole court.

Gardiner, for plaintiffs, cited *Thompson v. Perkins*, 3 Mason, 232; *Denston v. Perkins*, 2 Pick. 86.

Rand, for defendants.

By Court, PARKER, C. J. We can perceive no ground to distinguish this case from that of *Denston v. Perkins*, recently decided by this court, except the release signed by the plaintiffs in consideration of the assignment, and the evidence in regard to the usage of commission merchants in the sale of goods consigned to them.

With respect to the release, we do not see that it can operate to bar or extinguish the plaintiffs' claim. All the property of Vila & Co. was transferred to trustees, for the use of their creditors who should release them. The assignment would not in law transfer goods and merchandise entrusted to them, as factors, to sell; for the consignor's property remains in the goods, and in the proceeds of them, saving the lien which the factor may have for advances and expenses. The consignors may pursue the goods, or the price of them, notwithstanding such assignment. If it were not so, the property of the consignors, sold and unsold, would go to pay other creditors, who can not be presumed to have trusted a factor on the faith of goods merely intrusted to him for sale. The release is of debts due from Vila & Co. This ought not to be construed to be a relinquishment of the plaintiffs' right to goods, which Vila & Co. held in trust, or to the notes which they had taken from purchasers for the plaintiffs.

It is said, that according to the usage proved, the factor has such a control over the notes as would be inconsistent with the claim of property by the consignors; but we see no such inconsistency. No doubt the factor may, by breach of trust, or even with the implied assent of consignors, transfer the notes, or have them discounted to raise money, and innocent indorsees will hold them against the consignors; but while they remain in his hands, or in the hands of his trustees, as in the case before us, the consignees may assert their right, either against the trustees or the purchasers of the goods, if they have not made payment. It is said that the giving of a negotiable note by the purchasers is a payment, and that this distinguishes the case

from *Scott v. Surman*, Willes, 400; but suppose the debt to be paid by the note, the note does not thereby become the property of the factor.

If the consignor can not obtain the notes to sue the promisors, a difficulty might arise; but that would be between him and the vendee. The factor is still the trustee of the consignor, and a court of equity, with full powers, would reach the notes or the proceeds in his hands; but when he has received the money, or it has been paid to his trustee, the powers of a court of equity are not wanting to do justice. No doubt it will sometimes be difficult to distinguish the proportions belonging to many consignors, when the price of different parcels of goods has been consolidated into one note; but to this objection it is answered, as it was in the case of *Denston v. Perkins*, that here the plaintiff's interest is distinguished, and there is now no difficulty.

Judgment for the plaintiffs.

MANUFACTURERS' BANK v. WINSHIP.

[5 PICKERING, 11.]

PARTNERSHIP NOTE—BURDEN OF PROOF.—A promissory note signed by a person, in whose name a copartnership is carried on, does not, although in the hands of an innocent holder, *prima facie* bind his copartners; and the burden of proving that the note was given for the use of the copartnership is upon the holder,

ASSUMPTIO on a note signed by John Winship, payable to Samuel Jaques, or order, and discounted by plaintiff in the usual course of business. At the trial it appeared that the defendants, A. & J. Binney and Winship, were copartners in the tallow business at the date of said note, and that said business was carried on in the name of John Winship. Winship was also engaged alone in other business.

The jury found specially that the note was an accommodation note between Winship and Jaques, and that plaintiff discounted it on the belief that the Binneys were liable as copartners in the tallow business; and that the note was not discounted to raise money for the business of the copartnership.

Plaintiff's counsel objected that there being no evidence on the last point the jury need not find the fact either way; but the court instructed the jury that the burden of proof was on the plaintiff, and there being no evidence offered they should find for the defendant.

The verdict was returned subject to the opinion of the court on said facts.

H. H. Fuller, for plaintiffs. A promissory note signed with a style of a partnership is *prima facie* binding on the firm. The burden of proof is on the Binneys to show that the money was for the sole use of Winship and that the plaintiffs had notice of this fact when they discounted the note: *Gow. on Partn.* 64, 67, 69, 193; 8 *Ves.* 540; 15 *Mass.* 339; 7 *East*, 210; 11 *Johns.* 544; 4 *Id.* 251, 271, 279; 1 *Montag. on Partn.* 31, 33, 35, 37; *Peake's R.* 80; 3 *Dow.* 229; 4 *Campb.* 97; 1 *East*, 48; 2 *Esp.* 524, 731; *Chitty on Bills*, (6 ed.), 29, 30; 13 *East*, 175; 4 *T. R.* 720; 13 *Mass.* 178; 15 *Id.* 29; 6 *Munf.* 66; 2 *Cai.* 246; 1 *Campb.* 403.

Hubbard and Loring, contra, cited 4 *Johns.* 265; 6 *Ves.* 602; 15 *East*, 7; 6 *Esp.* 18.

By Court, PUTNAM, J. The authorities cited for the plaintiffs establish the position that a note or draft made or indorsed by an individual partner in the name and firm of the partnership, to an innocent purchaser, shall bind the partnership, notwithstanding the proceeds were misapplied to the separate use of the individual partner. In the language of the chief justice, in *Boardman v. Gore*, 15 *Mass.* 340: "There seems to be no limitation of the authority of any one of a copartnership over the credit of the whole, when dealing with persons as one of a house; such persons having no grounds to apprehend that the one with whom they deal is abusing the confidence of the others."

Such was the case of *Swan v. Steele*, 7 *East*, 210, where Wood & Payne were trading as partners in groceries, and afterwards admitted Steele to be a dormant partner with them in buying and selling cotton only. That business was to be carried on in the name of Wood & Payne, for the account of Wood, Payne & Steele, but was not to be at all connected with the business of Wood & Payne as grocers. It happened that Wood & Payne sold cotton to Maitland and received his bill of exchange in payment, and then they negotiated and paid that bill to Swan *et al.* for groceries. And Steele was properly held liable, notwithstanding he had no concern in the groceries. It was a misapplication of the funds belonging to the cotton concern, in which Swan *et al.* had no participation.

That case is somewhat like the case at bar, inasmuch as both of the concerns were carried on in one copartnership name.

But it did not appear in that case, as it does in this, that the plaintiff knew that the name used to carry on the business applied to more than one concern. In the case at bar there is nothing upon the face of the note indicating that it was made on the account of Winship and the Binneys, rather than on the account of Winship alone. It is found that Winship carried on business as a merchant on his own account, and also that the Binneys were connected with him in the manufacturing establishment at Charlestown, which was carried on also in the name and firm of "John Winship." If it had been proved that the note had been given for the use of the firm at the manufactory, the partners in that concern would be liable. It would have been just like the transaction with Hovey, where Winship gave his note for stock to be manufactured, which the Binneys paid. But the case at bar was left without any evidence upon that point, and the direction of the chief justice seems to have been perfectly correct, that the burden of proof was upon the plaintiffs. The partners are not to be charged, unless upon their contract, and no recovery is to be had against them, so long as it remains doubtful whether they have or have not made the contract declared upon.

The rule that a note or draft given in a partnership name, shall, in the hands of an innocent holder, be *prima facie* considered as having issued for the partnership account, must be confined to cases where the signature or other circumstances indicate a partnership concern. In such cases the burden of proof would rest upon the defendants; they might show that the partnership name had been misapplied, and that the holder knew that the paper was made for the account of the individual, and without the knowledge of the other partners.

From the fact found by the jury, that this was an accommodation note between Winship and Jaques, it would seem more likely that it related to the private concerns of Winship than to those of the partners. At any rate the uncertainty resting upon the face of the note would still continue. The plaintiffs knew, or might have known, that Winship was openly engaged in commercial speculations upon his own account, which were wholly unconnected with the manufactory, and that his signature might relate as well to one concern as to the other. If, therefore, they meant that the note should be enforced against the partnership, they should have ascertained that the signature of Winship was intended for the signature of the firm. But they made no such inquiry; and it does not appear that Winship

or Jaques ever made any representation to that effect. And although it appears that the plaintiffs supposed that the Binneys would be answerable, because they were partners with Winship in the manufactory, yet they gave no intimation whatever to the parties to the note to be discounted, that such was their understanding of the contract.

Upon consideration of all the facts in the case, we are all of opinion that the judgment must be rendered upon the verdict for the defendants.

See note to *Pateshall v. Apthorp*, 1 Am. Dec. 4, as to the effect of partner's note for firm debt; also *Arnold v. Camp*, 7 Am. Dec. 328. Effect of indorsing firm name for partner's debt: *N. Y. F. Ins. Co. v. Bennett*, 13 Am. Dec. 109.

HOLYOKE v. HASKINS.

[5 PICKERING, 20.]

PERSONS NON COMPOS MENTIS—DOMICILE OF.—The domicile of a person *non compos mentis*, may be changed by the direction or assent of the guardian of such person whether express or implied; and the domicile of a person *non compos*, who resided for many years, and died in Middlesex county, was held to be in that county, notwithstanding her guardian, who supported her, lived in Suffolk, and letters of administration on her estate granted by the probate judge of Suffolk, were held void for want of jurisdiction.

RETROSPECTIVE STATUTES.—A statute limiting the time to five years to recover real estate sold by an administrator applies only to sales made subsequent to the passage of the statute, and has no retrospective operation.

VOID ACTS ACQUIRE NO VALIDITY BY THE LAPSE OF TIME.—So held as to a grant of administration originally void for want of jurisdiction.

WRIT of right wherein the demandant claimed title to one undivided eighth of certain land as heir at law of Silence Eliot, who was alleged to have died seised of the same within forty years before the commencement of the suit. At the trial it was admitted that John Eliot died seised of the demanded premises, leaving as his heirs, Silence, Sarah, and Joseph Eliot. Silence and Sarah were born deaf and dumb, and lived with their father in Suffolk county until his death, in 1775, when they removed to Middlesex county, where they lived until their death, in 1787 and 1790. In 1782 John Haskins was appointed guardian of the person and property of Sarah and Silence, as persons *non compos*, by the probate judge of Suffolk, and he supported them until their death. In August, 1790, administration was

granted to Haskins upon the estates of Sarah and Silence by the probate judge of Suffolk; and Haskins, in pursuance of a license from the common pleas court, sold all the real estate belonging to said estate to pay debts, from which sale the tenants derived title. Demandant objected that the letters of administration were void because Sarah and Silence resided prior to their death in Middlesex county. The tenants insisted that the administration could not be impeached after a lapse of twenty years; also that the deceased persons' legal domicile was in Suffolk county, where they were born, and that the decree of the probate court as to the domicile was conclusive. Verdict for the tenants; and if the administration sale was invalid, the verdict was to be set aside, and a new trial granted; otherwise, judgment on the verdict.

Prescott and Porter, for demandant. The letters of administration are void because granted by the probate judge of the county of which the intestates were not residents nor inhabitants at the time of their death: Stat. 1783, c. 46, sec. 1; *Cutts v. Haskins*, 9 Mass. 543; *Griffith v. Frazier*, 8 Cranch, 28; Toller (3 ed.), 52, 120 *et seq.*; 7 Bac. Abr. 65; Void etc. B.; *Welch v. Nash*, 8 East, 394; *Smith v. Rice*, 11 Mass. 512; Com. Dig. Administrator, B. 5; *Hilliard v. Cox*, 1 Salk. 37; 11 Vin. Abr., 73, Executors F.; Const. pt. 2, sec. 2, art. 2, and sec. 3, art. 3, 4; Stat. 1786, c. 3, secs. 1, 2, 3; *Williams v. Whiting*, 11 Mass. 432, 434; *Putnam v. Johnson*, 10 Id. 501, 502; *Granby v. Amherst*, 7 Id. 1.

The removal of the intestates with their step-mother and brother to Natick gave them a domicile there: Code Napol., liv. 1, tit. 3, art. 108; Id., Motives, tom. 2, pp. 146, 151, 156, 159; Encycl. Jurispr., tit. Domicile and tit. Tutelle, pp. 94, 95; Domat's Pub. Law, Bk. 1, tit. 16, sec. 3; *Pottinger v. Wightman*, 3 Meriv. 67; 2 Bott's Poor Laws, 24, 26, 29.

Gorham and Hubbard, *contra*, contended that after the lapse of twenty years no fact could be alleged or proved to defeat the letters of administration; that this rule was required by public convenience and for the prevention of fraud: *Smith v. Rice*, 11 Mass. 513. The intestates, prior to their death, being *non compos mentis*, had no will of their own and they could not change their domicile, and that their guardians' domicile was their domicile: *Dict. Portat de Jurispr. et de Pratique par M. D. P. D. C.*, tit. Domicile and tit. Mineur; 2 Domat, 464; Publ. Law Bk. 1, tit. 16, sec. 10; Vattel, liv. 1, sec. 218; *Somerville v. Somer*

ville, 5 Ves. 786; *Upton v. Northbridge*, 15 Mass. 237. The court of common pleas had jurisdiction of the subject-matter; it will be presumed that it had jurisdiction to issue the license: *Gray v. Gardner*, 3 Mass. 399; *Colman v. Anderson*, 10 Id. 105; *Pejepscut Proprietors v. Ransom*, 14 Id. 147; *Perkins v. Fairfield*, 11 Id. 228.

By Court, WILDE, J. The principal points made in this case were settled, and we think rightly settled, in the case of *Cutts v. Haskins*, 9 Mass. 543. On the same facts now disclosed, it was decided that the domicile of Silence and Sarah Eliot, at the time of their decease, was in the town of Natick, in the county of Middlesex; that the power of granting administration of their estates appertained exclusively to the judge of probate of that county, and consequently that the grant of administration by the judge of probate for the county of Suffolk, and the subsequent proceedings thereon, were merely void.

That the proceedings and judgment of a court not having jurisdiction of the subject-matter depending, are *coram non iudice* and void, is a position too well established to be controverted. All acts done by ministers of justice without authority are nullities: *Case of the Marshalsea*, 10 Rep. 76.¹ If administration be granted upon the supposition that no will exists, and a will afterwards appear, all the proceedings under the administration are void: Toller, 120. And if the bishop grants administration and there are *bona notabilia* in divers dioceses, such administration is absolutely void: *Prince's case*, 5 Rep. 30.² It is true that if the metropolitan grant administration within his province, although it does not belong to him, it has been held to be voidable only, because he has jurisdiction over his province; but if he grant administration of goods in another province, it is void: 5 Rep. 30; Moore, 145, 693. So the grant of an original administration more than twenty years after the death of the intestate, is *ipso facto* a nullity: *Wales v. Willard*, 2 Mass. 120. If then, in the present case, the judge of probate for the county of Suffolk had no jurisdiction, it seems clear that the grant of administration, and the subsequent sale of the demanded premises under it, are void. And it is equally clear that he had not jurisdiction, if the domicile of the intestates, at the time of their decease, was in fact within the county of Middlesex.

The question of domicile is one of more difficulty, and has been argued on new ground, not noticed in the case of *Cutts v.*

1. This should be 10 Coke, 76.

2. This should be 5 Coke, 30.

Haskins. It has been strongly urged, that according to the facts reported, the legal domicile of the two Eliots still continued in Boston, the place of their births, notwithstanding their removal to Natick, and their long residence there; because by reason of their mental disability they had not, it is said, the power to acquire a new domicile. By the civil law, minors retain the domicile of their parents at the time of their decease, although they afterwards remove with the consent of their tutors, curators, or relations, because they are not permitted to change the order of their succession to personal property, which depends on the law of domicile: 3 Encyc. Juris. 804, tit. Domicile; 2 Domat, 487, Pub. Law, Bk. 1, tit. 16, sec. 3, art. 10. It is not, however, clear that the same disability, by the civil law, attaches to a person *non compos*. But admitting that it does, it is a principle not binding here, for the reason on which it is founded fails, and it does not appear to have been adopted as a principle of the common law. Here the right of inheritance is not changed by any change of domicile within the state, nor is the settlement of estates affected thereby. We cannot therefore suppose that the legislature had any reference to the principles of the civil law, for the purpose of limiting or defining the jurisdiction of the judges of probate. We consider the statute as referring to the actual domicile of the deceased, and not to the right of domicile; and it is very clear that the actual domicile of the deceased was in Natick. There they dwelt and had their home, and there alone were they liable to be taxed for their personal property.

If it were admitted that idiots, and persons wholly bereft of understanding, are incapable of changing their domicile, it would not follow that the same incapacity would attach to all degrees of mental imbecility. There are those, and not a few, who may be unable to manage their property and other concerns with good judgment and discretion, and may need guardians to protect them from imposition, and who nevertheless have sufficient understanding to choose their homes. It is not necessary, however, in this case, to rely upon any such distinction, because, I apprehend, it is clear that by our laws a guardian has the same power over his ward that a parent has over his child. He has the custody of his person, and may appoint the place of his residence. The domicile, therefore, of an idiot may be changed by the direction or with the assent of his guardian, whether express or implied.

It has been also objected that the demandant's action is barred by the twelfth section of Stat. 1817, c. 190, but this section

applies only to sales made subsequently to the passage of the act. It could not be construed to extend to sales made more than six years previous, without a violation of vested rights.

Another objection is, that the demandant's action is barred by lapse of time, more than twenty years having elapsed since the grant of administration; so that no new administration can now be granted. But no authority has been cited in support of this objection, and it is opposed to the case of *Griffith v. Frazier*, 8 Cranch, 9, in which letters of administration, being *durante absentia* of the executor, and a sale by the administrator were declared void, more than twenty years having elapsed after the grant of administration and the subsequent sale. The grant of administration being void, the case stands on the same footing as though no administration had been granted, and the pretended administrator had acted without the semblance of authority.

Again, it is said, as a writ of error will not lie to reverse a judgment after twenty years, so the decree of a judge of probate, after the same lapse of time, should be held valid. But there is a distinction between void and voidable acts; and besides, writs of error are limited by statute: 10 and 11 Wm. III, c. 14, so that the supposed analogy fails.

It was contended, lastly, that twenty years' possession is a good foundation for the presumption of a grant. But a grant will not be presumed nor prescription allowed, except as to incorporeal hereditaments. In a writ of right, nothing short of forty years' possession will avail. To decide otherwise, would be to repeal the statute of limitations. The tenant's title is merely a title by possession, and cannot be aided by any legal presumption, for the question of domicile being determined, the jury having established the fact that the last domicile of the deceased was within the county of Middlesex, the judge of probate in Suffolk had no jurisdiction, and nothing can be presumed in favor of his proceedings; nor can lapse of time render an act valid which was originally void. *Quod ab initio non valet tractu temporis non convalescit.*

Upon the whole, therefore, there seems to be no legal ground on which the tenant's title can be supported, and nothing appears, in any view of the case, to bar the demandant's action.

Verdict set aside, and a new trial granted.

See generally as to retrospective statutes: 5 Am. Dec. 315, note to *Dash v. Van Kleeck*, and *Gushen v. Stonington*, 10 Id. 121 and note. As to what statutes are not retrospective, see *Jones v. Jones*, 5 Am. Dec. 645; also, *Bedford v. Shilling*, 8 Id. 718.

BALLARD v. CARTER.

[5 PICKERING, 112.]

RESIDUARY DEVISE—WHAT PASSES BY—REVOCATION OF.—A residuary devise of “all his estate, whether real or personal,” will pass a mortgage held by the testator at the time of making his will; and a foreclosure of the mortgage or a release of the equity of redemption will revoke such a devise.

WILL—WHAT PASSES BY.—Real estate acquired subsequent to the execution of the will is not affected thereby; so held where the testator at the time of the execution of his will held a mortgage and subsequently acquired the fee to the land and canceled the mortgage.

WRIT of entry, in which the demandants relied upon their seisin of one sixth part of certain land, and a disseisin by the tenant. Wier being seised of the land in dispute, in October, 1815, mortgaged the same to John Ballard, since deceased, to secure the payment of three thousand eight hundred dollars, and subsequently mortgaged it for four hundred dollars more. March 31, 1815, Wier conveyed the land in fee to Ballard for an express consideration of seven thousand five hundred dollars; March 15, 1819, Ballard made his will, devising as follows: “I give to my sons, Joseph and John Ballard, and my daughter, Sally Carter, (the tenant’s wife), all my estate, whether real or personal.” In 1824 Ballard, the testator, died, seised in fee of the land in question, and ever since his death the tenant has been in possession on behalf of himself and wife, claiming the exclusive title to the same, he having purchased the estate of the sons, John and Joseph, in the land. The testator had six children, two of whom died in his life-time. The demandants were the only issue of one of these deceased children.

Did John Ballard die testate or intestate in respect to the demanded premises, was the question submitted to the court.

Sumner and Porter, for the demandants, cited 1 Rob. on Wills, 93; 1 Pow. on Mort. 457, 458; *Casborne v. Scarfe*, 1 Atk. 605; *Thompson v. Grant*, 4 Madd. Ch. 438; *McKinnon v. Thompson*, 3 Johns. Ch. 310; *Good v. Richardson*, 11 Mass. 473; *Smith v. Dyer*, 16 Id. 23; 1 Rob. on Wills, 251, 255, 294; 4 Dane Abr. 573; 6 Cruise Dig. 105, tit. Devise, c. 6, secs. 48, 57, 61; *Darley v. Darley*, Dick. 397; *Walton v. Walton*, 7 Johns. Ch. 272.

Solier, for the tenant, cited *Attorney-general v. Vigor*, 8 Ves 256; *Broome v. Monk*, 10 Ves. 605, 613;¹ *Biddulph v. Biddulph* 12 Ves. 161; *Rashley v. Masters*, 1 Ves. jun. 201.²

1. This should be *Broome v. Monk*, 10 Ves. 605.

2. This should be *Rashleigh v. Masters*, 1 Ves jun. 201.

By Court, PARKER, C. J. The demandants claim one sixth part of the tenement described in the writ, by descent, from John Ballard, their grandfather, who died seised thereof; and they have a right to recover according to their demand, unless the same passed by the will of John Ballard to Sally Carter, wife of the tenant, and to John and Joseph Ballard, by the residuary clause in the will. The tenement demanded had not been devised, except by this residuary clause, and provision was made by legacy or devise, for all his children and grandchildren in the will. So that, if this were his estate at the time of making the will as it was at the time of his death, there is no doubt it would have passed to the residuary devisees. The objections to the title under the will are, to be sure, of a technical character, but the rules on this subject have been too long established to allow us to depart from them, in order to seek for the probable intent of the testator.

Without doubt in most instances of wills which purport a disposition of the whole estate of the testator by particular bequest and a general residuary clause, it is intended to dispose of all of which the testator is the owner at the time of his death, without distinguishing between that real estate which he may own at the time of making the will, and that to which he acquired a title afterwards; and yet the rule is explicit and inflexible that real estate acquired after making the will goes to the heirs as undevisee estate; and this rule seems to have been founded on the interest which the law always takes in heirs, otherwise the same rule would apply to subsequent acquisitions of personal estate. The claim of the devisees, therefore, must be tried by this rule, and must stand or fall as it may be affected by it. If the title of the testator under the deed of Wier, which was executed on the thirty-first of March, 1819, is to be considered distinct from, and independent of, the mortgage of the same premises, which he previously held, then it is clear that it is undevisee estate. But as the testator was mortgagee of the same premises under a deed from Wier, which was executed long before the making of the will, and continued to be mortgagee after the making of the will, down to the time of the execution of the absolute deed, a question somewhat of an intricate nature arises as to the operation of the will under these circumstances. In settling this question we must reject the treaties and conversations which are stated in the case, as they can have no legal effect on the title of the testator under the deeds, parol evidence being wholly inadmissible in that view.

Now, with respect to the mortgage, we think the right of the testator would have passed to the devisees under the general clause, if it had continued in the same form to the time of his death; for whether this conveyance is to be considered a mere pledge or security for money, or as giving a title to land, so as to constitute real estate in the hands of the testator, it must be considered as devised under the words, "All my estate, whether real or personal, which may remain," etc. This, however, according to some of the authorities, might be questioned. In 3 Ves. jun. 348, it was determined that the legal estate of a mortgagee in mortgaged premises did not pass by a general residuary devise of all his estate and effects whatsoever and wheresoever. So, in 1 Atk. 605, it was decided that by a devise of all lands, tenements and hereditaments, a mortgage in fee should not pass. But in 2 P. Wms., 98, it is held that a devise by a trustee of all the rest of his real estate, will pass the trust estate, and in the note of Butler to Co. Lit. 203 (note 96), it seems to be considered by that learned editor that a mortgage will pass under such a devise, and the cases of *Marlow v. Smith*, 2 P. Wms. 198; and *Attorney-general v. Philips*, are cited. It would be a fruitless task to go over all the cases in the English books on this subject, with a view to reconcile them. It is enough for us that under the terms of the residuary clause in this will, it being expressly a devise of both real and personal estate, we are satisfied that this estate would have passed, had it remained unchanged until the death of the testator.

But then the case is met by another objection not less formidable, which, if not surmounted, is fatal to the title of the devisees. If the mortgaged estate is to be considered as at an end, and the mortgage discharged or canceled on the thirty-first of March, when the notes were given up and the absolute deed given, then clearly there was a new purchase, and according to the first proposition, which we suppose is not disputed, the estate is undevised. But admitting that the interest conveyed by the mortgage continued, so that the absolute deed is to be considered as a purchase of the equity of redemption only, operating by way of release, so that the title is now held under the two deeds, this will not remove the difficulty; for according to the authorities, this would be a revocation of the devise of the mortgage, supposing that to have passed under the will. On this subject of revocation there seems to have been an excessive degree of refinement in the English books, as well as some contradiction; and so it has been thought by

Lord Chief Justice Eyre and Lord Mansfield, as appears in the case of *Goodtitle v. Otway*, 1 Bos. & P. 576, and the case of *Swift v. Roberts*, 3 Burr. 1491. Still one principle runs through all the cases, and is admitted by all the judges, as well those who quarrel with, as those who support the doctrine of revocation to the extent to which it has been carried, and that is, that the deviser must be seised of the same estate at the time of his death that he was seised of when he made his will, to make it a good devise. In other words, that any alteration in the estate after the making of the will, amounts to a revocation. Lord Eyre, C. J., admits this in his very able argument in the case of *Goodtitle v. Otway*, in which he combats with great force the opinion adopted by the other judges of the court of common pleas and by the court of king's bench on error. And Lord Mansfield, though he considers the doctrine of revocation to have been carried to an inconvenient, if not an absurd extent, admits the same principle: *Doe v. Pott*, 2 Doug. 722. In assenting to this doctrine, we would understand by any alteration of an estate, a material alteration; one which changes the nature and effects of the seisin of a testator; for there are some cases in the books which we should not incline by anticipation to adopt as law here, especially as some very eminent judges in England think that a very harsh doctrine is established by them. To say that alterations for the express purpose of giving effect to wills should be held a revocation, as is laid down in Cruise's Dig., tit. Devise, c. 6, sec. 48 *et seq.*, appears somewhat paradoxical. So of the conversion of an estate-tail into a fee by common recovery, the testator supposing, when he made his will, that he had a fee; so of parting with an estate, though but for an instant, and taking back the same estate; all which are held to be revocations; and even the conveyance of an estate to another to the use of the testator, which in fact gives him the same estate he had before. These are all cases which may require consideration if they should arise here.

The general principle, as laid down by Ashurst, J., and the rest of the court, in the great case of *Goodtitle v. Otway*, 7 T. R. 419, is, that in order to dispose of an estate by will, it is necessary that the party devising should have the ownership of the land in him at the time of making the will, and that there should be a continuance of the same interest till the time of the death of the deviser, when the will is to take effect. This then is the rule by which this case must be settled.

Previously to the fifteenth of March, 1819, when the will was

made, the testator was seised in fee, but in mortgage, of the estate demanded. He continued so seised until the thirty-first of March, when he purchased out the mortgagor, by canceling his debt and paying him the residue of the agreed value, and took an absolute deed. The mortgage deed remains uncanceled, but the notes given as collateral security were given up. There are two lights in which this may be viewed, either as a new title arising under the last deed, or as a foreclosure by a purchase of the equity of redemption, so that the absolute deed would operate as a release. If the first character is attributed to it, then clearly the will did not operate on the estate, for it was a new acquisition; if the second, then, according to the authorities, there is such a change in the estate as amounts in law to a revocation of the devise of the mortgage. We think the authorities are clear and decisive on this point. "If a mortgagee," says Roberts on Wills, "after making his will, forecloses the mortgage, or obtains a release of the equity of redemption, the mortgaged lands will not pass inclusively, under the general words, lands, tenements, and hereditaments, contained in the will, but will go as an acquisition or purchase subsequent to the will, to the testator's heir at law:" 1 Rob. on Wills, 93, cites 1 Atk. 605; 2 Vern. 621; 1 Id. 3; 2 Vent. 351; 3 P. Wms. 62; Co. Lit. 203, b. n. 96; 3 Ves. jun. 348; 4 Id. 147.

This passage in Roberts probably is grounded upon the principle laid down in the books cited, that mortgaged lands not passing under the general residuary clause, the devise is not aided by the subsequent acquisition of an unconditional estate, and therefore may not strictly be founded on the doctrine of revocation. But there are other cases which go strongly to maintain the position, that any change of the estate of much less importance than the conversion of a mortgage into an unconditional estate, operates in law as a revocation. Lord Hardwicke, in the case of *Sparrow v. Hardcastle*, 3 Atk. 798, lays down the principle broadly, that the deviser must have an estate in the land devised, and the estate must remain in the same plight until his death, for the least alteration by any act of his, makes it a different estate, and therefore is an actual revocation. In 3 P. Wms. 166, is the case of *Marwood v. Turner*, which is a strong illustration of this principle. J. S., having a lease for three lives, devises it, and afterwards surrenders the lease and takes a new one to him and his heirs for three lives. This was held to be a revocation of the devise. So in the case of *Abney*

v. *Miller*, the testator devised a leasehold estate under Magdalen college, and after making his will, renewed his lease by surrendering the old one and taking a new one. This was held to be a revocation, there not being anything which amounted to a republication. This case is reported in 2 Atk. 593. A vast many other cases of a like nature may be found, but it is unnecessary to cite them, they all maintaining the principle, that a change of the estate after making a will is a revocation.

The case before us presented much stronger features of change than those which have been cited, or others in the books. The testator, at the making of the will, had only a mortgage upon the estate, to secure a debt of about one half the value. After making the will, he cancels the debt, takes a deed without condition, paying the difference in value between the debt and the estate. The mortgage, though not in fact canceled or destroyed, must be considered as sunk or merged in the absolute conveyance; and this was an entirely new purchase, which seems to have no legal connection with the mortgage. If it had, and the mortgage were still in force, the acquisition of an indefeasible estate would be a revocation, according to the authorities.

The cases cited by the tenant's counsel go principally to show that where the testator, having a contract for the sale of land to him, which may be enforced in equity, devises the land and then obtains a legal title, the devise will hold. This is undoubtedly true, but upon the principle, that in equity what is contracted to be done is considered as done, and that in truth there is the same estate before and after the legal title passes. There is no contract, however, on the part of the mortgagor, that he will sell the land to the mortgagee. It is true, that by the nature of the contract, there is a right to acquire a legal estate upon foreclosure; but that foreclosure is deemed a new acquisition. In this case the devisees do not stand so well as they would upon a foreclosure by the testator after making his will; for the transaction of the thirty-first of March can be viewed in no other light than as a new purchase at that time.

Tenant defaulted.

See, as to construction of residuary devise: *Read v. Payne*, 2 Am. Dec. 550. As to effect of will upon land subsequently acquired, see *Johnston v. Hunly*, 1 Am. Dec. 590. As to what words in a will will pass real estate, see the note to *Tolar v. Tolar*, 14 Id. 576. On the subject of implied revocations of devises, see the note to *Graves v. Sheldon*, 15 Id. 659.

HEATH v. WELLS.

[5 PICKERING, 139.]

VOID PROBATE SALE—RIGHTS ACQUIRED BY PURCHASER AT.—An authority to an administrator to sell real estate of the deceased to pay debts barred by the statute of limitations, is void, and a purchaser at such sale acquires no title to the property, but he is entitled to the value of the improvements placed by him on the land, under the limitation and settlement act.

ACTION of formedon in remainder. Plea, general issue. The tenants prayed that the increased value of the demanded premises, by reason of their building and improvements, might be determined, and the demandant, that a jury might decide the value of the land, had no improvements been made by the tenants. At the trial it appeared that T. Pemberton, by his will, devised the premises to Elizabeth Wells for life, remainder in fee to demandant. On July 13, 1807, Peter Roe Dalton was appointed executor of Pemberton's will, and on the twenty-seventh he gave due notice of his appointment. Dalton subsequently died, and administration *de bonis non* on Pemberton's estate was granted to Wm. Dodd, in August, 1813. On Dodd's application, in September, 1814, to sell so much of the real estate as should be necessary to satisfy a judgment recovered in March, 1814, against the administrator upon a bond executed by the testator in favor of Abigail Bassett, license was granted, and the demanded premises were sold in pursuance thereof by Dodd to the tenants, and conveyed to them by deed dated June 10, 1818. Elizabeth Wells died January 24, 1825, having occupied the demanded premises from June 10, 1818, to her death by leave of the tenants. The tenants claimed to have been in possession from June 10, 1818, until the time of the trial. Demandant became of age October 20, 1819. The demandant objected that the debts for which the land had been sold, were barred by the administration statutes of limitations at the time the license was given to sell the lands, and that he was entitled to the lands devised, clear of all claims, under the limitation and settlement acts, because the proceedings set up were void, and the tenant for life was in possession under the will, until January, 1825. Verdict for tenants, subject to the opinion of the court.

Townsend, for demandant. The sale to the tenants was void: *Wellman v. Lawrence*, 15 Mass. 329; *Emerson v. Thompson*. 16 Id. 429.

Adair, contra. The license to sell was sufficient protection to the tenants; you can not go behind the same: St. 1783, c. 32; *Perkins v. Fairfield*, 11 Mass. 227; *Leverett v. Harris*, 7 Id. 292; *Richmond Petitioner etc*, 2 Pick. 567; *Ex parte Allen*, 15 Mass. 58. As to the limitation and settlement act, he cited *Newhall v. Saddler*, 17 Mass. 350.

By Court, WILDE, J. Both parties claim title under one Thomas Pemberton, who it is admitted died seised of the demanded premises, having by his last will and testament devised the same to the demandant in fee, from and after the determination of the estate of one Elizabeth Wells, to whom the same was devised for life. This devise took effect, and the estate vested in possession in the demandant, on the death of the tenant for life, unless the provision in the will has been defeated by a sale made to the tenants by the administrator *de bonis non* on the estate of Pemberton, so that the case turns on the authority of the administrator, and the regularity of his proceedings, in relation to that sale.

In July, 1807, Dalton, the executor of Pemberton's will, was duly appointed to administer the estate, and thereupon gave notice of his appointment as the law directs. He lived and continued to administer the estate until September 8, 1811, more than four years having elapsed from the time of his appointment and notice given; and the demandant contends that by virtue of St. 1788, c. 66, the lien which the creditors had on the real estate was discharged.

It is clear that if an action had been commenced against Dalton by a creditor after the expiration of four years, he not having complied with the fourth section of that act, the executor might have defended himself by pleading the statute in bar; and he would have been bound so to plead. If he had suffered judgment to be recovered against the estate of the testator, execution could not have been lawfully extended on the real estate; for the statute was intended not so much for the relief of executors and administrators as for the benefit of the heirs: *Brown v. Anderson*, 13 Mass. 203; *Scott v. Hancock*, Id. 162; *Ex parte Allen*, 15 Id. 58.

The creditor's claim on the real estate, being thus extinguished, could not revive on the appointment of the administrator *de bonis non*: *Thompson v. Brown*, 16 Mass. 172. The real estate, therefore, was never assets in his hands, and he could have no authority to dispose of it. But it has been argued that we can not look behind the license, the court grant-

ing it having jurisdiction of the subject-matter, and consequently their decision being binding and conclusive on the heirs and devisees. The case of *Perkins v. Fairfield*, 11 Mass. 227, and of *Leverett v. Harris*, 7 Id. 292, are relied on in support of this position. But we think those cases are distinguishable from the case at bar, which more resembles the case of *Thompson v. Brown*, before referred to.

In the case of *Leverett v. Harris*, the sale by the administratrix had been made twenty-seven years before the commencement of the action, and the question was whether after such a length of time, during which the vendee remained in quiet possession, evidence should be received to impeach the proceedings in the probate court, and to contradict the certificate of the judge of probate, that the personal estate was insufficient to pay the debts. This evidence was very properly rejected, for the necessary consequence of admitting such evidence would have been to open the account of the administratrix, and to re-examine the proceedings in the probate court touching a matter of which it clearly had jurisdiction.

In the case of *Perkins v. Fairfield*, the estate of the deceased had been represented insolvent, and the certificate of the judge of probate was founded on the list of claims allowed by the commissioners. One of these had been afterward reduced by a trial at law, so that the proceeds of the real estate exceeded the amount of claims thus reduced, and the attempt was to set aside the sale as void on account of this excess. But the sale was held valid.

These cases may be supported without asserting that in all cases the license of court is conclusive. There is an evident distinction between a mistake made by a court having jurisdiction of the subject-matter, and the decision of a court not having cognizance of the case. In the case of *Perkins v. Fairfield*, the court had jurisdiction, and when the license was granted, the amount of sales authorized was correct, and after the amount of claims allowed had been reduced, still the court had jurisdiction. The license was in no respect erroneous, except in the amount of sales allowed. A case, therefore, was made out to which the jurisdiction of the court did by law attach; and the mistake of the court in authorizing a sale of more property than was necessary, was not to be corrected by vacating the whole sale.

But in the case under consideration, it appears that the court granting license to the administrator had no jurisdiction of the

subject-matter; for if the administrator had no right to sell, the estate not being assets in his hands, the court had no cognizance of the case, and the license was merely void. It was not a case for deliberation or decision. The license could give no authority to the administrator, who might as well have been licensed to sell the lands of a stranger. To make an administrator's sale valid, the right of the administrator to sell, and the license of the court must coincide: *Thompson v. Brown*, 16 Mass. 180. We are, therefore, of opinion that the demandant is entitled to recover, subject, however, to the provisions of the limitation and settlement act, to the benefit of which the tenants are clearly entitled. It is no objection to their claim that they entered during the continuance of the estate of the tenant for life, and that the demandant's title did not accrue until within six years from the commencement of the action. The shifting of the legal title does not affect the tenant's possession, and as they have had actual possession for more than six years, they are entitled to the benefit of the statute.

The verdict is accordingly to be set aside, and a verdict entered for the demandant; and by agreement of the parties, an assessor will be appointed to ascertain the increased value of the land by reason of the tenant's buildings and improvements, and also what would have been the value had no such buildings and improvements been made. Judgment to be rendered according to the report of the assessor, and the provisions of the statute.

COMMONWEALTH v. CHAPIN.

[5 PICKERING, 199.]

NAVIGABLE RIVERS—WHAT ARE.—Rivers are considered navigable as far as the tide ebbs and flows, and not navigable above that point.

RIGHT OF FISHERY in a navigable river is common to all, subject to governmental regulations.

RIPARIAN OWNERS—RIGHTS OF, IN RIVERS NOT NAVIGABLE.—The proprietor of the adjoining soil has the exclusive right of fishery in front of his land to the thread of the stream, in a river not navigable, subject to legislative regulations; but this right does not carry with it the right to prevent the passage of fish to the lakes and ponds, for increase of the species.

INDICTABLE OFFENSE AT COMMON LAW.—Obstructing the passage of fish by a dam built across a river not navigable, was not indictable at the common law, but recourse must be had to the statutory remedy.

PUBLIC EASEMENT.—The public have an easement for passing boats in rivers which are, in fact, navigable above the ebb and flow of the tide.

INDICTMENT for a nuisance, by erecting a dam across the Con-

necticut river, between Northampton and South Hadley. The indictment alleged that the river, at that part of it, was a public river, and that by said dam, boats, etc., had been prevented from going up and down the river, and the passage of salmon and other fish up the river had been obstructed, and the adjacent meadows covered with stagnant water, endangering the health and lives of the neighboring inhabitants. At the trial, the defendant objected that this being an indictment at the common law, the dam could not be considered as a nuisance, on account of the obstruction to the passage of the fish; but the judge instructed the jury that they might find a verdict against defendant, if they should be of the opinion that the fish were obstructed in their passage up and down the river, although the dam was no obstruction to the passage of boats, and did not endanger the health of citizens living in the vicinity. The jury returned a verdict against defendant, and stated that they found that the dam was no obstruction to the passage of boats, and that it did not endanger the citizens' health, but that it was an obstruction to the passage of the fish.

Bliss and Strong, for defendant. Obstructing the passage of fish by a dam built across a river not navigable, was not an offense indictable at the common law: *Anc. Charters*, etc., 148; *Hale's treatise*, *De Jure Maris*, in *Hargr. Law Tr.*, 5, 6, 8, 11; *People v. Platt*, 17 Johns. 211 [8 Am. Dec. 382]; *Adams v. Pease*, 2 Conn. 481; *Hooker v. Cummings*, 20 Johns. 90; *Stoughton v. Baker*, 4 Mass. 522 [3 Am. Dec. 236]; *Commonwealth v. Knowlton*, 2 Id. 530; *Commonwealth v. Ruggles*, 10 Id. 391; *Commonwealth v. Charlestown*, 1 Pick. 180 [11 Am. Dec. 161]; 2 Hawk. P. C., c. 75; 4 Bl. Com. 167; *Bac. Abr.*, Nuisance, A.; *James v. Hayward*, W. Jones, 221; *Hind v. Manfield*, Noy, 103; *Rex v. Smith*, 3 Keb. 640, 759; *Case of Chester Mill*, 10 Co. 137, b; *Com. Dig.*, Prerogative, D., 50; *Rex v. Smith*, 2 Doug. 441; *Prov. Stat.* 8 Ann., c. 3; 13 Geo. I, c. 9; 15 Geo. II, c. 6; 17 Id. c. 5; 19 Id. c. 2.

Davis, Solicitor-general. The obstruction of the passage of fish was a nuisance indictable at the common law; *Prov. Stat.* 8 Ann. c. 3; *Commonwealth v. Ruggles*, 10 Mass. 393; *Weld v. Hornby*, 7 East, 195; *Stoughton v. Baker*, 4 Mass. 527 [3 Am. Dec. 236]; *Coolidge v. Williams*, Id. 140; *Commonwealth v. Charlestown*, 1 Pick. 182 [11 Am. Dec. 161]; *Shaw v. Crawford*, 10 Johns. 238.

By Court, PARKER, C. J. [after stating the case]: So that

the question we have to determine is, whether the erection and continuance of a dam across Connecticut river, whereby the passage of fish up the river is obstructed, is indictable as a nuisance at common law, it not being averred to be contrary to any statute of the commonwealth.

It has been argued by the solicitor-general that the Connecticut is a public navigable river, which all the citizens have a right to use, as well for the purpose of taking fish therein, as for transportation of water craft up and down the same; so that any obstruction to either of those uses is contrary to law, and a nuisance. It does not appear by the facts reported, or by the verdict, whether at the place where the dam is built the river is navigable or not; we may take it for granted, however, that the place is above the flowing and ebbing of the tide, and that being the case, it is not a navigable river there, within the meaning of the term navigable as understood by the common law. The doctrine of Lord Hale, as laid down in his treatise, *De Jure Maris*, has been approved of and adopted as the law of England, of New York, Connecticut, and of this commonwealth; and he divides rivers into two classes, navigable and not navigable. They are considered navigable where the tide ebbs and flows, and not navigable above that point. The former belong to the sovereign or public, the latter may be the subject of private property. In the former the fishery is common to all the subjects, under such restraints as the government may impose; in the latter it belongs to the owners of the soil adjoining to and under the river, for the owner of the land is owner to the thread of the river, *usque ad filum medium aquæ: vide* Hargr. Law Tracts, 6, 7, 8; Davies Rep. 152; *The People v. Platt*, 17 Johns. 209 [8 Am. Dec. 382]; *Adams v. Pease*, 2 Conn. 681; *Carter v. Murcol*, 4 Burr. 2162.

This doctrine, however, is denied in Pennsylvania to be applicable to their great rivers, for they are considered public property in regard to all their uses, wherever they can be applied to any public benefit, whether the tide ebbs and flows there or not; so that in that state the fishery in the rivers, as well as in the sea, is common to all the citizens. We do not consider ourselves at liberty to depart from the common law in this respect, any further than the ancient usages and course of legislation in this commonwealth will justify us. And to a certain extent, without doubt, the property of the owners of the land on the banks of rivers is qualified as well by the same common law itself, as by the ancient customs and legislation of our own government.

The right of passage and of transportation upon rivers not strictly navigable belongs to the public by the principles of the common law; but the right of fishery remains unrestricted, so that each proprietor of the land adjoining has a several or exclusive right of fishery in the river, immediately before his land, down to the middle of the river, and may prevent all others from participating in it, and will have a right of action against any who shall usurp the exercise of it without his consent.

And yet it appears that this common law right of several fishery in the owners of land bordering on rivers not navigable, is subject to a reasonable qualification, in order to protect the rights of others, who, in virtue of owning the soil, have the same right, but might lose all advantage from it, if their neighbors below them on a stream or river might with impunity wholly impede the passage of fish into the lakes or ponds, where they by instinct prepare for the multiplication of the species. This restriction is founded upon that universal principle of every just code of laws: *Sic utere tuo ut alienum non lædas*. Upon the same principle, that the exclusive property in the banks and bed of a river is subject to the public easement on the waters, the right of several fishery is limited to the taking of fish, but does not carry with it the right to hinder the passing of them above, that other owners may be prevented from enjoying a similar privilege.

This doctrine is fully recognized by the court of king's bench, in the case of *Weld v. Hornby*, 7 East, 194. The plaintiff in that case being possessed of a sole and several fishery in a small stream not navigable, undertook to convert a brush weir, through which some of the fish might and did escape, into a solid stone weir, which was wholly impervious. This was determined to be a nuisance, because it obstructed the passage of fish higher up the stream. So that, perhaps, there is no doubt but that the erection of the dam complained of in this case, would be an offense at common law; and the rather, because the Connecticut is a large river, extending through several states, and its banks are thickly settled, so that a great population is interested in the preservation of the fish which frequent the river.

But the common law in regard to this subject has been essentially altered by successive legislative acts, from the earliest settlement of our country, as well under the colonial and provincial, as under the present form of government. And the rights of the citizens of the commonwealth, as well as the

penalties to which they may be subject, are to be determined by the effect and according to the form of this legislation, rather than by the ancient common law.

One of the earliest, and it seems the most frequently occurring subjects of legislation has been that of the fisheries in the numerous streams which communicate with the ocean, in this commonwealth. Though a source of profit and support to multitudes of people, it was found also to be a fruitful source of disorder and contention growing out of the conflicting rights of individuals, as well as of towns, which, by being owners of land, became owners of the banks of rivers which afforded convenience for fishing. The regulations which have been deemed, from time to time expedient, qualify and restrain private rights on these subjects; but beyond these regulations, the right of property, according to the principles of the common law, is left unaffected. And furthermore, even where the restriction exists at the common law, the course of legislation has been such as to prescribe and limit the penalties for disregarding it, so as to exclude the common law entirely in relation to them.

Thus by Prov. St. 8 Ann., c. 3, all persons are prohibited from placing in or across rivers or streams, any fixed implement or machine by which the free passage of fish may be obstructed. And by Prov. St. 15 Geo. II., c. 6, it is required of those who build dams across streams or rivers, to keep open, during a certain period, sluiceways or passages for the fish to pass through. These statutes assert the right of the public to regulate the mode of taking fish, even in private or several fisheries; and they also, by implication, recognize the right of proprietors to erect dams and other works on rivers or their banks, provided a passage is left through them at certain portions of the year for the escape of the fish.

By the St. 8 Ann, above cited, the erection of certain obstructions is declared to be a nuisance, and by a particular process therein specified, such obstructions are to be abated; but those obstructions are not dams erected for permanent use, but hedges, weirs, fish-garths, stakes and kiddles, which, though not permanent, may occasion an entire interruption of the passage of the fish; and there is a special exception of dams erected for the use of mills. But by St. 15 Geo. II., there is an implied grant or recognition of the rights of proprietors to erect and maintain dams, provided they secure a passage for the fish by sluices, etc., during the season when they are accustomed to ascend the streams. This legislative provision, though altering,

is not contrary to the common law, for by that the proprietors of banks might make such obstructions as were necessary to the taking of fish, leaving room enough for some of them to escape and ascend the streams. The statute only ascertains the mode in which this restriction shall be enforced, and provides the penalty for neglecting or violating it. But it is plain that the mere erecting or continuing a dam whereby fish may be obstructed, is no longer an offense, for that would be committed by an erection, however necessary, for any profitable use of the fishery. The offense consists only in having a dam, without providing a convenient passage for the fish during two or three months in the year, and the remedy where this requisition is not observed, is totally different from that which exists at common law for a nuisance. Instead of abating a dam which is found to be deficient, the statute provides a pecuniary mulct, and gives power to certain municipal officers to supervise the public interests, and see to the execution of the law.

It follows, we think, clearly, that an indictment as at common law for a nuisance cannot be maintained, but that if the dam should be continued without opening through it, at the proper season, a passage way for the fish, the proprietors will be subject to the penalty provided by the statute.

The judgment, therefore, is arrested, and the defendant discharged.

In Pennsylvania large rivers, although the tide does not ebb and flow, are considered navigable: *Carson v. Blazer*, 4 Am. Dec. 463. In New York the rule is otherwise: *Palmer v. Mulligan*, 2 Id. 270. See generally as to what rivers are navigable: *Arnold v. Mundy*, 10 Id. 356, note 385; *Cates v. Wadlington*, Id. 699; *Hooker v. Cummings*, 11 Id. 249, note 253. As to fishery rights in navigable rivers, see *Carson v. Blazer*, 4 Id. 463; *Post v. Munn*, 7 Id. 570; *Browne v. Kennedy*, 9 Id. 503; *Arnold v. Mundy*, 10 Id. 356; *Hooker v. Cummings*, 11 Id. 249, note 253.

WATT v. MAXWELL.

[5 PICKERING, 217.]

EVIDENCE—INCOMPETENT, OBJECTION TO, WHEN WAIVED.—An objection to evidence as incompetent is waived unless made when the evidence is offered.

DEED OF NON COMPOS MENTIS.—The deed of a person *non compos mentis*, is voidable unless such person has a guardian, and if so, the deed is void.

COVENANT on a deed from defendant's intestate, Wilder, to plaintiff, dated March 15, 1821, containing the usual covenant of seisin, a breach of which was alleged. Issue joined on the

plea that Wilder was seised. Defendant, to prove seisin of Wilder, offered in evidence a deed to him from Dorothy Kemp, dated May 24, 1819. It appeared that in June, 1818, upon an inquisition had, it was certified that Dorothy was unable to take care of herself, and the probate judge appointed guardians over her, but without her having any notice of the inquisition. Defendant objected that such proceedings were insufficient to avoid Dorothy's deed, and the judge so held. Evidence was introduced by plaintiff that at the date of the deed Dorothy was *non compos mentis*, and by defendant, to show that she was capable of transacting her business. The jury were instructed that they might consider the probate court proceedings, but that they were not conclusive to show that Dorothy was *non compos mentis*. Verdict for plaintiff, but if the judges' decisions were wrong a new trial was to be granted.

Ashmun, for the defendant. The proceedings of the probate court were void because it was not alleged that Dorothy Kemp was *non compos mentis*, and because she had no notice of the inquisition: *Chase v. Hathaway*, 14 Mass. 222; *Cutts v. Haskins*, 9 Id. 543. That the deed of a person *non compos* was voidable, not void: 2 Blk. Com. 29; Com. Dig., Idiot, D 2.

Wells, for the plaintiff.

By Court, PARKER, C. J. The decree of the court of probate, granting letters of guardianship, is void, because it does not appear that any notice was given to the subject of it before the inquisition taken; nor is there any judgment or decree ascertaining that she was *non compos*. Probably the proceedings of the probate court would have been rejected from the evidence, if a motion to that effect had been made at the trial. They were objected to only as proving conclusively the incapacity of Dorothy Kemp, and the objection was sustained by the court; but the proceedings remained in the case and made part of the evidence committed to the jury. A new trial is not necessarily to be granted because evidence has been introduced into a cause, which, if liable to objection, ought, upon motion, to have been rejected, not even if such evidence is commented upon by the judge; for it sometimes happens that evidence, which would be inadmissible if objected to, is admitted by consent, and if the judge is not called upon to decide on its competency, it ought to be considered as tacitly assented to. If this were not the rule, it would be in the power of parties to put the adversary to expense and delay by trying the chance of a verdict in their

favor, and if they fail of obtaining a new trial, which would be injurious to the rights of the party gaining the verdict. Besides, if the evidence offered is objected to, it may be supplied by other evidence, or the party who offers it may abandon his cause in that stage of the proceedings without incurring additional expense. It should be understood, therefore, that unless the court is moved for the rejection of evidence, it must be considered that all objections are waived, and that no relief can be had after the verdict, on the ground of the incompetency or informality of the evidence. And the same rule will be observed in relation to the charge of the judge respecting such evidence, if he is not specially asked to consider it as not belonging to the case, on account of inadvertency in the counsel in suffering it to pass without objection.

We are satisfied, however, that the verdict has been returned upon a wrong principle, and that it is within the discretion of the court to grant a new trial, notwithstanding the point on which we decide was not distinctly raised at the trial. The deed of Dorothy Kemp was not void, but only voidable. It conveyed a seisin to the grantee, defeasible by her, her heirs or devisees, when entry should be made to avoid it. The issue therefore was maintained by the defendant, for the only point was whether Wilder was seised when he conveyed to the plaintiff. It is very clear that he was, according to the effect given to deeds of bargain and sale by our statute. Had Dorothy been actually under guardianship when she made the deed, it would have been otherwise, as the decree and letters of guardianship would have taken from her all capacity to convey; but there was no such decree or letters, the whole proceedings on that subject being null and void; so that, the presumption of law was in favor of her capacity, and her deed was valid, until by entry or action the grantee was ousted, or the deed avoided.

We think, as the rule of damages would be different on the other covenants in the deed, there ought to be a new trial, with leave to the plaintiff to amend, by adding a count or counts on the other covenants, and that if the defendant prevails, he should recover no costs for the term at which the former trial was had.

New trial granted.

The deed of a person deaf and dumb is not void: *Brown v. Brown*, 8 Am. Dec. 187.

LIABILITY OF INSANE PERSONS AND IDIOTS ON CONTRACTS: See note to *Jackson v. King*, 15 Am. Dec. 361.

SAUNDERS v. FROST.

[5 PICKERING, 259.]

INTEREST OF MORTGAGOR AND OF HIS SECOND AND THIRD MORTGAGEES.—

A mortgagor's interest is subject to sale and transfer, and the interest which his second mortgagee acquires is the right to redeem from the first mortgage, and the interest which the third mortgagee has is to redeem the second mortgage by performing the conditions thereof, and thereby acquire the right to redeem in like manner from the first mortgage, and having performed the conditions of the first and second mortgages, the holder of the third mortgage becomes entitled to the possession of the mortgaged estate as the holder of the three mortgages.

JOINDER OF MORTGAGEES IN A BILL TO REDEEM.—Where F. was first mortgagee, C. was second mortgagee, and C., S. & W. were third mortgagees, and C. assigned to F. the second, and all his interest in the third mortgage, it was held that S. and W. could maintain an action to redeem without joining C. as a party plaintiff, and that they could have done so, even if C. had not assigned, for as to the second mortgage his interest was adverse to theirs. It was also held that redemption could be made from F. by tendering him the amount of the first and second mortgages.**THE RIGHTS OF ASSIGNEE OF A MORTGAGE** are not superior to those of his assignor. Hence, where C., S. & W. were joint mortgagees under a third mortgage, and C. assigned to F. a prior mortgage, it was held that F. did not thereby acquire the right to apply the rents and profits of the estate to the payment of the last mortgage, nor to demand from S. and W. the payment of C.'s one third of the third mortgage as well as the whole of the prior mortgages held by F.**A CREDITOR CAN NOT BE REQUIRED TO ACCEPT** a part of a debt which has not become due.**A MORTGAGEE WHO HAS ENTERED FOR CONDITION** broken for non-payment of interest, is not obliged to accept payment of principal not yet due; but the mortgagor has the right to regain possession and protect his estate by paying or tendering the interest due.**POWER OF COURT IN FORECLOSURE.—**A court of equity has power to make any decree necessary to complete justice between the parties; and execution may be awarded at once or at some future time, as equity may require.**A TENDER OF PRINCIPAL AND INTEREST**, when only the latter was due, is good, unless the creditor shows a willingness to accept the amount due.**IF F., S., AND W. ARE CO-TENANTS OF A JUNIOR MORTGAGE**, and F. owns a prior mortgage in severalty, if S. and W. bring an action to redeem, they must pay the whole of the prior mortgages, and if they do so, they will hold the whole premises, unless F. chooses to reimburse them for his proportion of the moneys so paid.**COSTS ARE ALLOWED AT LAW**, although the plaintiff recovers a part only of his demand; unless the defendant prior to the commencement of the action tendered the sum due.**IN EQUITY, COSTS ARE AWARDED**, in the discretion of the court, to either party as justice may require; but the litigant who succeeds in equity is

prima facie entitled to his costs; and the one who fails must show affirmatively some reason why costs should not be allowed against him.

A MORTGAGEE ALWAYS RECOVERS his costs, unless it appears that the suit was occasioned by his unreasonable or fraudulent conduct, in which case he is liable for the costs.

COSTS IN EQUITY where both parties are in fault will not be allowed to either.

BILL in equity by subsequent mortgagees to redeem from two prior mortgages, and to compel the release thereof. On the trial, the following facts were proved: In June, 1821, Joseph Winship made a mortgage deed to the defendant Frost, to secure two notes previously executed. In February, 1822, the same mortgagor executed a second mortgage to one Carew, who assigned it to the defendant Frost. In June, 1823, the mortgagor made a third mortgage to Carew, and the plaintiffs, A. Saunders and D. Winship, to secure Carew and D. Winship for their liability as sureties on a note to the Hartford bank, and to secure Carew as surety on a note to the Springfield bank; and to secure a note to D. Winship for five hundred and sixty-eight dollars, and another note given to Saunders for five hundred and fifty-six dollars. In September, 1825, Carew assigned all his interest in the third mortgage to Frost.

The defendant, Frost, in August, 1823, took and thereafter held possession of the mortgaged premises for condition broken, by the non-payment of the interest due on his two notes. As mortgagee in possession, he had collected about two hundred and sixty-six dollars, and had expended about fifty dollars, including six dollars and seventy-five cents paid for insurance, and six dollars and sixty-two cents for making an aqueduct for the accommodation of the house, there being no well on the premises.

In April, 1826, the plaintiffs tendered the defendant eight hundred dollars, to redeem the premises from the first two mortgages. Afterwards, but subsequently to the commencement of the suit, J. Winship conveyed to plaintiff his remaining interest in the mortgaged realty.

Willard, for the defendant, contended; 1. That two tenants in common cannot join in a real action: *Rehoboth v. Hunt*, 1 Pick. 224; Litt. secs. 311, 312; 2. That one of the defendant's notes not having become due, he could not be compelled to receive the money and release the mortgages; that the plaintiffs did not, as they ought to have done, tender the interest alone; that the defendant was in possession under his general right as mortgagee

as well as for the breach of one of the conditions; *Colman v. Packard*, 16 Mass. 39; *Wilder v. Houghton*, 1 Pick. 89; *Perkins v. Pitts*, 11 Mass. 130; that the plaintiffs ought not to recover seisin and possession while any sum remains unpaid: *Taylor v. Townsend*, 6 Mass. 264 [5 Am. Dec. 107]; 3. That the defendant had the right to apply the rents and profits to the debt secured by the third mortgage; that a subsequent mortgagee may have the rents and profits with the assent of the prior mortgagee: *Newell v. Wright*, 3 Mass. 138 [3 Am. Dec. 98]; *Goodwin v. Richardson*, 11 Mass. 474; 4. That plaintiffs were bound to tender sufficient to discharge the three mortgages; 5. That the defendant ought to be allowed for making an aqueduct and for insurance paid; and that, in stating his account, the defendant ought to be allowed annual rests at which interest should be allowed on the debt, but that no interest should be allowed against him for the rents collected.

Bliss, jun., for the plaintiffs, replied: 1. That the suit was not in the nature of a real action: Litt. 312; Stearns on Real Actions, 198, 199; *Penniman v. Hollis*, 13 Mass. 430; *Parson v. Welles*, 17 Mass. 427; that the plaintiffs could not sever; that their joinder was beneficial to them and not injurious to defendant: Co. Lit. 198; *Weller v. Baker*, 2 Wils. 423; *Some v. Barwish*, Cro. Jac. 231; *Taylor v. Porter*, 7 Mass. 355; 2. That the defendant must be treated as in possession for non-payment of interest alone; that the interest had been paid by the rents: *Tirrell v. Tirrell*, 17 Mass. 117; that the plaintiffs may have relief without disturbing defendant's right to the moneys not yet due: *Perley v. Chandler*, 6 Mass. 456 [4 Am. Dec. 159]; *Williams v. Amory*, 14 Mass. 20; *Penniman v. Hollis*, 13 Mass. 429; 3. That the defendant's rights under the third mortgage did not exceed those of his assignor: *Hills v. Eliot*, 12 Mass. 26 [7 Am. Dec. 26]; *Warden v. Adams*, 15 Mass. 243; *Brigham v. Eveleth*, 9 Id. 542; *Sargent v. Parsons*, 12 Id. 152; that a mesne incumbrancer may insist on the application of rents to a prior mortgage: *Robinson v. Cumming*, 2 Atk. 410; *Gould v. Tancred*, Id. 534; *Lord Penrhyn v. Hughes*, 5 Ves. 99; *Tracy v. Hereford*, 2 Bro. C. C. 128; *Newall v. Wright*, 3 Mass. 154; *Coppring v. Cooke*, 1 Vern. 270; *Bentham v. Haincourt*, Prec. Ch. 30; 4. That the defendant as tenant in common with plaintiffs ought to aid them in redeeming from the two first mortgages: *Dering v. Earl of Winchelsea*, 2 Bos. & P. 270; *Taylor v. Porter*, 7 Mass. 358; *Campbell v. Messier*, 4 Johns. Ch. 339 [8 Am. Dec. 570]; *Lawrence v. Cornell*, 4 Johns. Ch. 345; *Cheesebrough v.*

Millard, 1 Id. 407 [7 Am. Dec. 494]; *Stevens v. Cooper*, Id. 425 [7 Am. Dec. 499]; 5. That the defendant ought not to be allowed for the aqueduct: *Russell v. Blake*, 2 Pick. 506; *Godfrey v. Watson*, 3 Atk. 517; *Moore v. Cable*, 1 Johns. Ch. 385; *Bonithon v. Hockmore*, 1 Vern. 316; 6. That interest on interest could not be allowed, and that the rents and profits as they accrued ought to be applied to the payment of the interest and principal: *Howard v. Harris*, Id. 194; *Davis v. Higford*, 1 Ch. R. 28; *Ex parte Champion*, 3 Bro. C. C. 440; 1 Madd. Ch. Pr. 427; *Digby v. Craggs*, Ambl. 612; St 1808, c. 98, p. 3.

By Court, PARKER, C. J. The rights of the parties to this process require an analysis of the complicated transactions under which they severally claim a decree in their favor.

The first mortgage to Frost was intended to secure two notes of three hundred dollars each; one payable in three, and the other in six years from the date, with interest annually. There remained in Joseph Winship, the mortgagor, only a right of redeeming the estate by paying the interest annually, and the principal debts as they became due. No subsequent conveyance by Winship could impair Frost's right to hold the land to secure those objects. But still Winship had an interest, which was a legal subject of contract and transfer. On the eleventh of February, 1822, having this right, he conveyed the same in mortgage to Carew to indemnify him against a note, on which he was surety to Edward Pyncheon. Carew's right then was to redeem the former mortgage, which he could do only by performing the condition of that deed, viz., paying the interest of six hundred dollars annually, and the installments of the principal, according to the condition. Still, an interest was left in Winship, which was also a legal subject of contract and transfer. And this interest was, on the sixteenth of June, 1823, legally assigned by another mortgage to the same Carew and the two plaintiffs to secure them on several liabilities or debts due to them. The right acquired under this mortgage was to redeem the second mortgage by performing the condition thereof to Carew, whereby, as legal assignees of that mortgage, they would have a right to redeem the first mortgage by paying the debt due to Frost.

In this state of things, omitting for the present any consideration of Carew's assignment to Frost, it will be well to consider what remedy the two plaintiffs would have, in order to avail themselves of the interest which they had acquired under this third mortgage. And we think they must have severed

from Carew in their bill, for his interest as mortgagee of the second mortgage was adverse to theirs, and the process against him must have been compulsory to oblige him to cancel, release, or discharge his mortgage; and he would have been obliged to contribute to the redemption of the mortgage to Frost, if he would avail himself of his third mortgage; otherwise he would have the benefit of the security as if he was the first mortgagee. And if the two plaintiffs had paid the whole debt to Frost and discharged the second mortgage, they would hold the same as assignees of that mortgage until Carew should have paid his just proportion, deducting, however, the amount he was entitled to receive under his second mortgage, which must be satisfied in that way, or by payment to him by the plaintiffs, before they could have any benefit from the third mortgage, in which alone they were interested. If he chose not to redeem, as he might from an opinion that the estate was not of sufficient value to pay the amount secured in Frost's mortgage and his own second mortgage, he could not be compelled, but in that case he could not claim any interest in the estate under the joint mortgage to himself and the plaintiffs; or if it should be considered that he held the legal estate as tenant in common, by bill in equity, he might be compelled either to convey to his co-tenants, or to pay his proportion of the sum paid to redeem.

The two present plaintiffs then, by tendering the sum due to Carew on his second mortgage, would be entitled to redeem against Frost, and by paying his debt would have a right to possession of the estate. It is to be seen then whether the defendant Frost, by virtue of his assignments from Carew of the two mortgages in which he was a party, stands in a better position against the claims of the plaintiffs than Carew would if he had not assigned. It is an invariable principle, that an assignee with notice must be subject to all the disadvantages and liabilities of the assignor. The assignment to Frost of Carew's first mortgage was more than a year after the mortgage to the plaintiffs and Carew, and the assignment of Carew's interest in the third mortgage was nearly two years after that mortgage was made; so that full notice of the rights of the plaintiffs must be presumed. Frost then is to be dealt with as Carew would be; and he cannot, in virtue of his first mortgage, gain any advantage over the plaintiffs in relation to the third. He took a common interest with them in what remained after satisfaction of the two first mortgages, and was equally bound with them to

clear off those incumbrances, provided he would enjoy any interest under the third mortgage. The two plaintiffs then have a right to treat him as mortgagee of the first mortgage, and assignee of the second, and by tendering what is due, to have possession of the estate without regard to his interest in the third mortgage, which interest may be settled in a future process. If he is content with those two debts, he may receive and hold the whole; but if he claims indemnity under the third mortgage, he must pay his proportion of the sum necessarily paid to make it valid. Nor can he apply the rents and profits of the estate to the reduction of the debt secured by the third mortgage, for he entered only under the first, and his possession and receipt of rents was in virtue of that only. Carew could not by this process have gained an advantage over his co-tenants, and there is no reason why Frost should have a greater privilege.

The principal question then is as to the effect of the tender of the eight hundred dollars. There was nothing due, at the time of the tender, but one note and the interest which had then accrued on the six hundred dollars secured by the first mortgage. The tender can be considered valid only in relation to the interest, and the amount of the note which was due, for the mortgagee could not be compelled to receive payment until it became due. He had a right to keep his money at interest according to the contract. But the mortgagor must surely have a right to protect his estate from foreclosure, where the mortgagee has entered for the non-payment of interest only, otherwise his estate may be sacrificed before the payment of the principal becomes due. If the entry be for breach of one condition only, where there are several, some of which have not been broken, the mortgagor may restore himself by tendering payment of the interest within the three years upon the whole, and the portion of the principal which has become payable, and he ought to have judgment for possession, unless the mortgagee, in answer to his bill, will set up his general right under his mortgage, in which case a special decree may relieve the estate from the effect of the condition which is broken, and leave the mortgagee in possession of his legal rights. There will then be a decree according to equity and good conscience, within a fair construction of the statute, and though no execution will issue for possession, it is only because the defendant interposes a superior title at law; or if it be thought necessary, in compliance more strictly with the words of the statute, judgment for possession may be entered, and a

stay of execution ordered, until further proceedings are had, when the residue of the condition of the deed shall be performed. There is no alternative but to grant execution and put the mortgagee to a new entry on his general title; for so gross an injustice can not be allowed, as that the mortgagee shall have it in his power to tie the hands of the mortgagor and prevent him from redeeming the estate; which would be the inevitable effect of giving him a right to enter for non-payment of interest and refusing to the mortgagor all power of defeating this attempt to foreclose. Without doubt it was the intention of the legislature, by Stat. 1798, c. 77, to give to the court general equity jurisdiction in cases of mortgage, so that any decree which may be necessary to effect justice between the parties is within the authority of the court to pass; the court are to decree and enter up judgment agreeably to equity and good conscience, and to award execution accordingly. If an execution be not necessary or not proper to be issued immediately, still a decree may be passed which shall bind the parties to what is determined by the court to be equity between them; and either no execution may be awarded, or it may be awarded at some future time. according to the discretion of the court in the premises.

Thus we think, if the tender of all that was due was sufficient, but the mortgagee still had a right to hold possession by virtue of his legal estate created by the mortgage, or because he subsequently entered or declared that he held for the breach of some other condition, a decree may be made that he shall hold possession, with a view to foreclose, no longer upon the breach of the condition for which the tender was made, but that no execution issue, because of his other claim; and upon another or supplemental bill, when the other conditions shall have been performed, or tender made of what is due, within the prescribed time, another or further decree may be made, which shall be final between the parties.

Something of this nature was contemplated in the case of *Taylor v. Weld*, 5 Mass. 125, for by the decree, which, among other things, awards continually a writ of *habere facias*, "the court reserved a further hearing upon the case as to the rents and profits, and the making any further decree or decrees relative thereto, as justice may require;" intending no doubt to award execution against the mortgagee for any surplus of rents and profits, beyond what he was entitled to retain for repairs. They must therefore have considered that on a case coming within the statute, full and complete power was given to the

court to order and decree according to the principles of chancery courts, whatever real equity required between the parties.

In regard to the validity of the tender, according to the defendant's showing, viz., that only the interest was then due, there can be no objection to the amount; but it is objected that the tender was made for the debt not due, which the defendant was not obliged to receive, and, therefore, it could not avail as a tender for the interest only. But it appears to us, that in order to avail himself of this objection, the defendant ought to have shown a willingness to take what was due, and to have stated that he claimed to hold possession only for the non-payment of interest. With respect to the demand of a release which accompanied the tender, it does not appear that the tender was conditional. The demand was made because the statute requires that upon tender of payment a release or other discharge shall be given; but the defendant showed no willingness to take the money. If he had taken it, and then refused to cancel the mortgage, so far as related to its security for the interest then due, a bill would have lain against him, according to the statute, and it would seem that a demand of possession and a release, accompanying the tender, is proper; for it is a demand of the performance of a duty imposed upon the mortgagee by the statute. So that the case of *Loring v. Cook*, cited in the argument, does not apply, for Cook was not obliged to execute a release or any other instrument, the payment or tender being sufficient, without any act on his part to defeat his title. With respect to the mode of accounting, about which there is a controversy, we shall refer the case to a master, unless the parties can adjust the matter upon such principles as we herein state.

If the defendant elects to hold under his third mortgage, he must contribute to the discharge of the other mortgages, in the proportion that his interest in that mortgage bears to the interest of the other two mortgagees. If he does not so elect, we think they must pay off the two other mortgages, and they will hold the land until they are reimbursed his proportion.

We think he ought not to be charged with the lost rent, as there appears to have been no negligence on his part.

The rents received should be set off against the interest on his prior debts, so that interest may operate equally on both sides. He is not to be allowed for insurance, nor for the aqueduct as repairs, it not appearing that without the aqueduct the farm would not have been supplied with water. [At May term, 1828,

in Hampden, the minutes of the decree were corrected, by allowance of the sum charged for the aqueduct.]

At this term, September, 1827, a bill of revivor and supplement was filed by Saunders and Ruth B. Winship, an infant, by her next friend, representing that Daniel Winship died on the first of November, 1826, whereby the suit brought by him and Saunders had abated, and that Ruth was the only child and heir of the deceased; and further representing that the note given by Joseph Winship to the defendant, payable in six years, had become due, and praying that a decree might be made embracing the whole subject-matter of the several bills, according to the rights of the parties at the time of making the decree.

On the twenty-fourth of April, 1827, the day when that note became due, the sum of nine hundred dollars was tendered to the defendant, but this was not stated in the supplemental bill.

The court at May term, 1828, said this bill was defective; it should set out the new tender; but as no answer or plea had been filed, the plaintiffs might have leave to amend without costs.

Upon the question of costs the following opinion was delivered.

WILDE, J. In actions at law, the prevailing party is entitled to costs, although he does not prevail to the full extent of his claim. Thus, if the plaintiff in an action recovers only a part of his demand, he will, nevertheless, be allowed costs, which has been found in some instances, though not frequently, to operate inequitably. Generally the defendant may protect himself by tendering the sum due, and if the plaintiff refuses to accept it, he will proceed at his peril; so that cases rarely occur in which a party can reasonably complain of the general provision of law, as to the taxation of costs.

In suits in equity, however, the court is authorized at its discretion to award costs to either party as equity may require, and it can not be doubted that such a discretion is peculiarly proper to be exercised by a court of equity. But in the exercise of this legal discretion we must not lose sight of the general rule as to the taxation of costs, which ought not to be departed from, unless equity clearly requires it; for in courts of equity, as well as in courts of law, generally the prevailing party is entitled to costs. *Prima facie* the party who fails must pay costs, and it depends on him to show the existence of circumstances in a sufficient degree to displace the *prima facie* claim of costs: 2 Madd. Ch. Pr. 415. And Lord Eldon regrets

that he could not feel at liberty to establish the rule universally prevailing at law; that costs should abide the event of the suit: *Vancouver v. Bliss*, 11 Ves. 462.

In this case we consider the plaintiffs as the prevailing party, and the question is whether there are any circumstances appearing in the case to show an equitable claim on the part of the defendant to an allowance of costs in his favor. The defendant, however, principally relies on a rule adopted by the English courts of equity, which is, that the mortgagee shall recover his costs, unless it appears that the suit has been occasioned by the unreasonable or fraudulent conduct on his part, and that in no case is he liable to pay costs. The first branch of this rule seems to be fully supported by the cases cited; but it is not clearly settled that the mortgagee shall in no case be charged with the costs, although the current of the English cases seems to maintain the rule to this extent. The chancellor so considers it in the case of *Detillin v. Gale*, 7 Ves. 583, and yields to its authority, although he manifestly thinks it opposed to the principles of equity. "It is," says he, "a very clear moral proposition that the mortgagee ought to pay all costs his unnecessary and oppressive dealings have occasioned." If then the English rule is unreasonable and inequitable, we clearly are not bound to adopt it. On the contrary, admitting it to be a rule opposed to a "clear moral proposition," we are bound by the highest obligation of official duty to reject it. We do not adopt the English rules of practice indiscriminately, but only as they appear reasonable and conformable to the spirit of our system of jurisprudence and general rules of practice. Now the rule that the mortgagee is under no circumstances chargeable with costs, is not only unreasonable, but directly opposed to the statute of 1798, c. 77, which expressly authorizes the court "at their discretion to award costs to either party, as equity may require." This discretion could not be exercised if we were fettered by the English rule. The only question, therefore, is, what does equity require. And in the first place, we think it does not require us to award costs in favor of the defendant, since, as it appears to us, they have been principally occasioned by the unjust attempt on his part to foreclose the mortgage, and through a supposed defect in the law to deprive the plaintiffs of their right to redeem.

The defendant made four points of defense at the trial. He contended: 1. That a suit in equity could not be maintained between tenants in common; 2. That the defendant had a right

to apply the rents and profits towards the extinguishment of the third mortgage; 3. That the plaintiffs could not redeem without tendering all that was due to defendant on the three mortgages; and, 4. That the defendant was not compellable to receive his debt before it became due, and consequently that he was not bound to discharge the mortgage. The three first objections we consider wholly groundless. The first objection might be well founded in a court of law, but even at law ejectment will lie by one tenant in common against a co-tenant after an ouster. Whether the taking possession by the defendant, and keeping it, under the circumstances of the case, was equivalent to an actual ouster, might be doubted. But in courts of equity this nice distinction of the common law is disregarded, and no principle or reason recognized by courts of equity, has been suggested in support of this objection. So the claim of the defendant to appropriate the rents towards the third mortgage, when he held under a prior mortgage is unsupported by law or equity. And the third objection is equally unsupported. The last objection had more weight, and was a fair subject of discussion; but it was not sufficient to bar the plaintiff's action, as has been already decided.

The defendant also objected to the jurisdiction of the court under the statute of 1798, and has intimated a wish again to be heard on this point. But we are satisfied with our former decision. The defendant then, having failed in his defense, and having interposed objections to the plaintiff's title, some of which were groundless and unreasonable, would not be entitled to costs, even under the English rule. We do not, however, impute to the defendant any unworthy motives. It is difficult, we are well aware, for any one to exercise an impartial judgment in his own cause, or in that of a client; but if the defendant has mistaken the law, and has attempted to defeat the plaintiff's right to redeem, against equity and the manifest justice of the case, there is no color for his claim of indemnity for the expenses incurred in such an unsuccessful attempt; an attempt manifestly unjust, whatever might have been his opinion as to his legal rights.

The remaining question to be considered is, whether costs ought to be allowed in favor of the plaintiffs. If this were a suit at law, no doubt the plaintiffs would be entitled to costs, as the prevailing party, although they have not prevailed to the full extent of their claim. But where both parties are in fault, as is the case here, the rule of equity is against the allowance

of costs to either party. The plaintiff's demand to have the mortgage discharged was wholly unfounded, and how far this groundless claim contributed to increase the expense of litigation, we can not determine. The defendant was justified in resisting this claim, and if he had done nothing more, he would clearly be entitled to costs. But taking into view all the circumstances of the case, we are of opinion that neither party has made out an equitable title to costs, and that their respective claims therefor must be disallowed.

COSTS AT LAW.—In actions at law the rule seems to be well settled, both in England and in this country, that the prevailing party is entitled to costs, although he may recover only a part of his demand, and this rule has been established by statutory regulations in many of the states: *McReynolds v. Cates*, 7 Humph. 29; *Little v. Lockman*, 5 Jones L. 433; *St. Charles v. O'Mailey*, 18 Ill. 407; *Wood v. Brown*, 6 Daly (N. Y.), 428; *Wall v. Covington*, 76 N. C. 150; *Brandies v. Stewart*, 1 Metc. (Ky.), 395; *Underwood v. Lacapere*, 14 La. Ann. 276. The losing party may, however, by offering to confess judgment for a certain amount, be entitled to costs, accruing subsequent to the offer, provided the successful party fails to recover more than the amount offered: *O'Conner v. Arnold*, 53 Ind. 203; *Bathgate v. Haskin*, 63 N. Y. 261; *Rucker v. Howard*, 2 Bibb, 166-169; *Holden v. Kynaston*, 2 Beav. 204-206; *Build. Assn. v. Crump*, 42 Md. 192.

COSTS, WHO MAY RECOVER.—A judgment for costs must be entered in favor of a party to the action, and can not be entered in favor of any one but a party: *Patterson v. Officers of the Circuit Court*, 11 Ala. 740; *Winship v. Conner*, 43 N. H. 167.

COSTS, IN EQUITY.—In suits in equity the allowance or disallowance of costs depends largely on the facts and circumstances of each particular case, and rests entirely within the discretion of the court, to be exercised upon principle, and with reference to the general rules of practice, and as equity may require. *Prima facie* the prevailing party is entitled to costs, and it is incumbent upon the losing party to show the existence of circumstances sufficient to overcome the *prima facie* claim of the prevailing party; and if circumstances are proved which show that it would be inequitable to compel the unsuccessful party to pay costs, the court may, in the exercise of a sound judicial discretion, refuse costs to either party, or it may impose the same upon the prevailing party: *Vancouver v. Bliss*, 11 Ves. 462; *Glen v. Fisher*, 10 Am. Dec. 310; *Hunter v. Marlboro*, 2 Woodb. & M. 168; *Gray v. Gray*, 15 Ala. 779; *Temple v. Lawson*, 19 Ark. 148; *McArtee v. Engart*, 13 Ill. 242; *Stone v. Locke*, 48 Me. 425; *Decker v. Caskey*, 2 Green. Eq. (N. J.) 446; *Carpenter v. E. A. R. R. Co.*, 28 N. J. Eq. 392; *Clark v. Reed*, 11 Pick. 449; *Travis v. Waters*, 12 Johns. 500; *M. E. C. v. Jaques*, 1 John. Ch. 65; *Cowles v. Whitman*, 10 Conn. 121; *Robinson v. Cropsey*, 2 Edw. Ch. 138; *Eldridge v. Strenz*, 39 N. Y. Sup. Ct. (7 J. & S.) 295; *Belmont v. Ponvert*, 38 Id. (6 J. & S.) 425; *Massing v. Ames*, 38 Wis. 285; *Hess v. Beates*, 78 Pa. St. 429; *Frisby v. Ballance*, 4 Scam. (Ill.) 287; *Pearce v. Chastain*, 3 Kelly (Ga.) 226; *Lee v. Pindle*, 12 Gill & J. 288-305; *Brooks v. Byam*, 2 Story, 553; *State of Pennsylvania v. Wheeling Bridge Co.*, 18 How. (U. S.) 421.

In *Clark v. Reed*, 11 Pick. 448, Putnam, J., in delivering the opinion of

the court, states the general rule in equity proceedings with his usual accuracy: "We adopt the general rule, that the prevailing party is to have costs, as applicable to suits in equity as well as at law. It will be applied unless the losing party can show that equity requires a different judgment. If it should appear that the plaintiff had good reason to think the respondent was liable upon equitable principles to pay money, to perform specific contracts, or to make discovery, and it should, upon hearing of the answer, appear that no such cause existed, as the plaintiff had reason to suppose did exist, the court would not award costs against him, if it appeared that the respondent was in such a situation as to render it probable that he was amenable to the call of the plaintiff upon equitable principles. On the other hand, if it should appear that the plaintiff knew the whole ground, and made a claim in equity, which was successfully resisted by the respondent, it would seem that costs should be allowed as well in equity as at law. The mere change of the forum should not in reason make any difference in the question of costs."

In the case of *Robinson v. Cropey*, 2 Edw. Ch. 148, the plaintiff brought a suit to quiet his title, which had neither been impeached nor threatened by the defendants, and although a decree was entered in his favor quieting his title, he was decreed to pay the defendants' costs; the vice chancellor in determining that case said: "I shall decree that the defendants, as the representatives of John Sharp, or as standing in his place, have no right to redeem or repurchase under the agreement of the first day of May, 1819. This is all the complainant has asked for upon the hearing. I am of opinion he must pay the costs of the defendants in the present suit, saving, however, so much as may have occurred from the examination of Mrs. Sharp as a witness. The bill was filed for the complainant's ease, and to quiet his own apprehensions. These defendants had not questioned or even threatened to impeach his title. I do not perceive there has been unnecessary litigation on their part. Several of them are infants. The bill is one of double aspect. It seeks an alternative relief. The defendants had a right to point out and insist upon what was most favorable to them; and in doing so, although they have not succeeded, I am not disposed to leave them burdened with costs. There are instances of defendants setting up claims of right and failing, and yet are considered as entitled to costs against a complainant: Beames on Costs, 94, and cases cited; 2 Chitty's Eq. Dig. 933 (u); Id. 934 (w)." In *Pearce v. Chastain*, 3 Kelly (Ga.), 230, plaintiff filed a bill to be relieved against a judgment at law, and although the relief prayed for was granted the complainant was directed to pay costs. Mr. J. Lumpkin, in rendering the opinion of the court, uses the following language: "Moreover, as this court is clothed with authority to award in every case such order and direction in the premises as may be consistent with the justice of the case, we deem it but right that the complainant should be taxed with costs. Costs in chancery do not always follow the event of the suit, but are awarded according to the justice of the cause." In *Brooks v. Byam*, 2 Story, 553, Story J., in dismissing the plaintiff's bill because he failed to show a sufficient title, decreed that each party must bear his own costs, because it appeared that the bill might have been disposed of by demurrer, but defendant, instead of demurring, had answered, and thus compelled the taking of testimony. The determination of the lower court as to the allowance of costs is generally treated as final, and will not be reviewed on appeal unless there has been a palpable abuse of discretion in making the award: *Shields v. Bogliolo*, 7 Mo. 136.

SECURITY FOR COSTS.—In many of the states by statutory regulations, non-residents commencing actions, or for whose use actions are commenced in the courts of the state, are required to give security for the payment of costs, and unless such security is given the action will be dismissed: Alabama Rev. Code, secs. 2902, 2937; *Stillman v. Dunklin*, 48 Ala. 175; Ohio Code, secs. 543-545; *Caldwell v. Manning*, 24 How. Pr. 38; Cal. C. C. P., sec. 1036.

COSTS — WHERE THE UNITED STATES IS A PARTY.—Costs are never included in a judgment entered against the United States: *U. S. v. Barker*, 2 Wheat. 395; *U. S. v. Hooe*, 3 Cranch, 73; *The Antelope*, 12 Wheat. 546; *U. S. v. Boyd*, 5 How. 29; and this rule has been held to apply where a state was a party: *State v. Harrington*, 2 Tyler, 44; *Collier Gov. v. Powell*, 23 Ala. 579.

BALL v. CLAFLIN.

[5 PICKERING, 303.]

AMENDMENTS—WHAT ARE ALLOWED AS.—Amendments are not allowed so as to entirely change the cause of action set forth in the plaintiff's original complaint.

ORIGINAL declaration was *indebitatus assumpsit* for goods sold and delivered. Under leave to amend plaintiff filed two new counts, charging the defendant with merchandise and promissory notes received by him as factor and not accounting therefor. No evidence was offered in support of the two last counts.

Verdict for plaintiff. Defendant moved for a new trial on the ground that the two new counts filed set up a different cause of action from that stated in the original declaration.

Davis and Allen, for the motion, cited St. 1784, c. 28, sec. 14; *Haynes v. Morgan*, 3 Mass. 208; ninth rule of Court, 16 Mass. 373; 1 Comyn on Contr. 261; *Mason v. Waite*, 1 Pick. 452; *Vancleef v. Therasson*, 3 Id. 12.

Newton and Denny, contra, cited *Haynes v. Morgan*, 3 Mass. 208; *Phillips v. Bridge*, 11 Id. 246; 4 Id. 93; 7 Id. 440; 1 Id. 433.

By Court, PARKER, C. J. The only question in the case is, whether the counts filed at the trial were receivable within the rule respecting amendments; that is, whether they related to the same cause of action, and are consistent with the former counts; for this is the only limitation of the right to amend, as defined in the case of *Haynes v. Morgan*, 3 Mass. 208, and the ninth rule of practice as adopted by the court at March term. 1820.

The rule is simple and clear, and yet it has been found difficult of application; so that, questions relating to amendments

are constantly springing up in various parts of the commonwealth. The new count offered under leave to amend must be consistent with the former count or counts; that is, it must be of the like kind of action, subject to the same plea, and such as might have been originally joined with the others. It must be for the same cause of action; that is, the subject-matter of the new count must be the same as of the old; it must not be for an additional claim or demand, but only a variation of the form of demanding the same thing. Amendments made conformably to the rule thus explained can do no injury to any one. Neither the defendant nor his bail, nor subsequent attaching creditors, have ground of complaint, when their liability is in no degree changed or affected, except merely in regard to want of form, which our statute of jeofails is made to cure and guard against.

Some of the cases cited have been thought to exhibit a harsh application of the rule, as where an action of *indebitatus assumpsit* for goods sold was brought, and the plaintiff was not allowed to file a count on a promissory note alleged to have been made on settlement, and as payment of the account; but it is plain the cause of action was different, though the amount of money demanded might be the same. A subsequent attaching creditor or bail might rely upon its appearing on trial that the account had been settled and paid, and ought not to be surprised with a new count upon a promissory note, which, of itself, extinguished the old cause of action, and created a new one. This was the *Hampshire case*, cited in 3 Pick. 14, but not reported. So, where the count is on an implied promise to indemnify, a new count on a special promise to indemnify in a particular way, is for a new cause of action, as in the case of *Little v. Little*, cited in 3 Pick. 13. It is recollected, too, that in this last case, under the general count, no right of action had accrued when the suit was brought, no damage having happened at that time, whereas on the special contract, according to the terms of it, an action immediately lay; so that, the second attachment, which was good under the writ as at first issued, was entirely defeated by the new count. The case of *Willis v. Crooker*, 1 Pick. 204, and that of *Vancleef v. Therasson*, 8 Id. 12 (2 ed. 14, n. 1), are of a similar character.

The case before us does not present the mischief intended to be guarded against in either of those cases. Certain goods and merchandise are the subject of the first count, and they are charged as sold and delivered. The same goods are the sub-

ject of the two new counts, and the defendant is charged with having received them to sell, and not having accounted for them. In these counts the damages sought to be recovered are the price or value of the goods.

But it is said that on the *indebitatus assumpsit*, as for goods sold, the plaintiff could not have prevailed, so that a second attachment would come in. We do not understand that it is the right of third parties, either creditors or bail, to avail themselves of a mere defect in the form of declaring. If it were so, no amendments could be allowed, and the rule would be nugatory. It is to cure defects of form that the statute and the rule were made. And where the plaintiff has the right to the value or the price of goods, which have come to the hands of the defendant in such manner as that he is accountable on implied or express contract for the value or the price, the form of the action is wholly unimportant to third persons, although they may be eventually interested in the suit. There is but one contract, one cause of action, one single subject-matter of the suit. The plaintiff has mistaken the manner of declaring for it. This is the very case where by virtue of the statute and the rule he is entitled to amend.

Judgment according to verdict.

See, as to what amendments are not allowed: *Shock v. McChesney*, 2 Am. Dec. 415, note, 417; *Cassel v. Cooke*, 11 Id. 610, note, 623; *Jackson v. Murray*, 13 Id. 517. The subject of amendments after appeal is discussed in the note to *Rew v. Barker*, 14 Am. Dec. 516. In *Spawn v. Veeder*, 15 Id. 401, amendment of a bill of particulars was allowed after trial and a new trial granted, and after the cause had been twice noticed for trial.

SARGENT v. SOUTHGATE.

[5 PICKERING, 312.]

NEGOTIABLE NOTE—SUBJECT TO WHAT DEFENSES.—A negotiable note indorsed when overdue is subject to all equities existing between the maker and payee; and in an action by an indorsee holding a note so transferred the maker may show as a defense a negotiable note of the payee made to him that was intended as payment of the note in suit.

SET-OFF—A NEGOTIABLE NOTE THE SUBJECT OF.—A negotiable note held by the maker against the payee of a note in suit may be pleaded as a set-off in an action by an indorsee against the maker of the note sued on; provided the note sued on was indorsed after it became due.

ASSUMPSIT on a note of defendant for one hundred and eighty dollars, dated May 5, 1822, payable on demand to S. D. Watson

or order. In June, 1822, Watson received of defendant sixty dollars, for which he gave his promissory note. A few days later a third person at Watson's request obtained from defendant fifty dollars more, for which he gave defendant Watson's due bill, dated June 8, 1822.

It appeared that said third person, when requested by Watson to obtain the fifty dollars from defendant, asked for the note of defendants to take with him to defendant, but that Watson said there was no need of it, as he had got the other sum without it. Plaintiff objected that a negotiable note having been taken for the sixty dollars, it could not be allowed as a payment or set-off against the note in suit. Objection overruled. Defendant also filed in set-off two other notes made to him by Watson, dated in January and June, 1823, and an account current with Watson, the balance of which, with the notes, exceeded the amount due on the note in suit. The note in suit was indorsed to plaintiff in the early part of 1824. It was objected that the two last mentioned notes of Watson's and the balance of account were no defense to this action.

A nonsuit was recommended, with liberty to move to set it aside, and if plaintiff was entitled to recover, defendant was to be defaulted, and the amount to be recovered to be determined by the court.

Norton, for plaintiffs, contended, that the two notes of January 1 and June 2, and the balance of account, could not avail as payment, for there was no connection between them and the note in suit: *Holland v. Makepeace*, 8 Mass. 418; *Clark v. Leach*, 10 Id. 51. Neither can they be filed in set-off, for they are not between the parties to the suit: *Knapp v. Lee*, 3 Pick. 452; *Hallowell v. Howard*, 13 Mass. 235; *Procter v. Newhall*, 17 Id. 81; *Goodwin v. Cunningham*, 12 Id. 193; *Jenkins v. Brewster*, 14 Id. 291.

Davis and Washburn, contra. Plaintiffs are either equitable assignees or trustees for Watson; the court will not regard the mere names on the record, but will look at the justice of the case, in regard to payment or set-off: *Bayley on Bills* (by Phillips and Sewall) 82, and note; *O'Callaghan v. Sawyer*, 5 Johns. 118; *Loomis v. Pulver*, 9 Id. 244; *Bowman v. Wood*, 15 Mass. 535; *Knapp v. Lee*, 3 Pick. 452; *Esp. N. P.* (Gould's 2 ed.) 84; *Clark v. Leach*, 10 Mass. 51; *Field v. Nickerson*, 13 Id. 137; *Hatch v. Greene*, 12 Id. 197.

By Court, PARKER, C. J. In regard to the two first items

claimed by the defendants as paid, on account of the note on which he is sued, we think there is no doubt, from the evidence, that those sums were so paid. Watson, the payee, requested the witness to ask the defendant for fifty dollars, stating that he had a short time before received sixty dollars, and was unwilling to ask so soon again, and when the witness asked for the note to take with him, Watson answered there was no need of it, he had got the other sum without the note. The witness then went to the defendant and asked for fifty dollars for Watson, which he received, and gave a due bill for it in Watson's name. This sum and the other sum of sixty dollars, for which Watson gave his promissory note, were unquestionably paid on account of the defendant's note to Watson. The form of the evidence, to wit, a promissory note and due bill, is no reason why they should not be used in defense of the note, the intention of the original parties being plain, and the present plaintiffs being subject to the same defense as Watson would be, were he the plaintiff, they having received this note long after it was due, and received it, in fact, as agent and trustee of Watson to collect, and pay his debts with the proceeds.

With respect to the other demands, consisting of a note for fifty dollars, dated January 1, 1823, and a note for twenty dollars, dated June 2, 1823, and the balance of account due from Watson to the defendant, as there was no direct evidence that they were for moneys advanced or articles delivered specially on account of the note in suit, the defendant can not avail himself of them in defense, except under our statutes of set-off, he having filed these demands according to those statutes. Considering that these demands arose while Watson had possession of the note in suit, that he was an embarrassed man, and had a right to call on the defendant for money, there can be little doubt that it was in fact paid by the defendant, and received by Watson towards payment of the debt; but the evidence does not prove it to be so.

After a good deal of deliberation with a view to other cases before us, as well as this, we have come to the conclusion that the defendant may avail himself of these just and equitable claims against Watson, under the statute of set-off. That statute is remedial, and ought to have a liberal construction; it was intended to prevent the nominal creditor from recovering what may be due to him by the form of the contract, when in truth he is the debtor; and it is in extension of this sound principle of justice that he alone is substantially the creditor in whose

favor the balance exists, that the courts allow judgments between the same parties to be set off, and that the legislature subsequently provided that executions also should be placed one against the other, whatever may have been the cause of action originally between the parties. It is true that the statute of set-off contemplated mutual demands between the same parties; but the common law or law-merchant treats the holder of a promissory note, which was dishonored when he took it, as the party to the contract, for all purposes of defense, when he shall put his note in suit. The principle as stated by Bayley, in his Treatise on Bills, is, that he "who takes a bill after it is due, takes it subject to all the objections and equities to which it was liable in the hands of the persons from whom he takes it:" Bayley (Phillips and Sewall's ed.) 82. Many authorities are cited by the American editors of this book, which fully support this broad and general principle. It is very obvious that this principle can not be applied in many instances where the necessity of it will frequently occur, unless the operation of the statute of set-off can be made to apply to those who are not the original parties to the contract. It is quite common for those who have given negotiable securities to make advances to their creditors on the faith and expectation of an allowance and adjustment, although not in the direct form of payment of their notes. Death or insolvency of the payee often occurs, and manifest injustice is done if the party so advancing is to be treated as a debtor to the whole amount, and as a creditor for what he may have so advanced. If his note is transferred while unimpeached, it is but right that he should suffer, for he has promised every *bona fide* holder according to the face of the note. But he who takes it with notice of grounds of defense, or after it is due, which the law charges as notice, is holden to take it altogether on the credit of the indorser, knowing, or being presumed to know, that if the promisor had any dealings with the payee which would justify a defense, the note is chargeable with that defense in his hands. Now by our statute the promisor can, by giving notice, avail himself of moneys paid, goods sold and delivered, or services rendered, in an action on a promissory note by the payee. This is in fact a defense legal and equitable, and it is clearly within the principle laid down by Bayley and others as applicable to notes taken when overdue; and if it cannot be applied because the note is indorsed, then the principle fails to an extensive degree, in cases where it would be most just and equitable to apply it. We think it

would cease to be a general principle, and would only be a rule for particular cases not more meritorious than those which would not come within it.

The cases of *Holland v. Makepeace*, 8 Mass. 418, and *Clark v. Leach*, 10 Id. 51, are relied upon principally to support the objection. The case of *Holland v. Makepeace* is within the excepted cases in the English and New York reports. Makepeace claimed to set off against a debt due from him to Coates, which had been assigned to Coates's creditors, he having failed, a note exceeding in amount the debt for which he was sued, which he had purchased at a discount after the failure of Coates. It was held, and rightly, that he should not change his condition to the prejudice of the creditors of Coates, by a voluntary purchase of a debt. It was unjust towards the creditors, and came neither within the letter nor the spirit of the statute of set-off. There is nothing in the case analogous to that which is before us, and the decision therefore does not stand in the way of the principle which we think justice requires us to adopt, and which the spirit of the law will sanction.

There are expressions in the opinion of the court, as delivered by Sedgwick, J., which without doubt are unfavorable to the relief sought for in this case, but the reasoning in support of opinions often goes beyond what the case requires, and such reasoning, though entitled to respectful consideration, is never held to be binding on courts in subsequent cases; and it ought not to be, for it is only the facts before the court which call for a decision of the law, and a different state of facts may require a modification of the principle, or the application of a different one.

The judge considered the provision of the statute of 1784, that if upon the trial a balance shall be found in favor of the defendant, he having filed his account in set-off, he shall recover the same, in the same manner as if he had brought his action therefor, as conclusively showing that the statute could not be applied against the indorsee of a promissory note. But we do not see why the equitable provision for a defendant, who is sued by the indorsee of an insolvent debtor, who took the note, as the law presumes, on the credit of the indorser only, it being dishonored, should not be extended as far as the circumstances will justify, that is, to a defense in the action, without any necessity of the defendant's recovering a balance against the indorsee. The subsequent statute of 1793, c. 75, sec. 4, has no such provision, and though the former statute is not repealed,

yet under this last statute there is no doubt a judgment in favor of the defendant would be good, although he should not recover any balance that might appear to be due to him from the original party to the contract. The filing of the account in the clerk's office is merely for notice to the plaintiff; the defendant may prove as much of it as is necessary for his defense, and may abandon the residue. The statute of 1793 enacts, that the defendant may give in evidence, upon the general issue, his demands against the plaintiff for goods delivered, moneys paid, or services done, whereof an account shall be duly filed, etc. Now the law-merchant, which is the common law, says, that when a man purchases a note which is dishonored, it shall be subject to the same defense against him as if the action were brought by the payee. Against the payee the defense set up in this case would be perfect and complete; then it must be good against the present plaintiff, who has voluntarily substituted himself for the payee, and the forms must accommodate themselves to the principle. But it is said it was not intended that the assignee shall be bound to contest a demand, made by the defendant against the assignor, on a negotiable security which the defendant might have purchased.

This is true, and we wish not to disturb the principle, but to ground ourselves on the position laid down by the same judge, that such facts as will show that the security at the time of the assignment had become invalid in the hands of the original holder, shall equally avail the defendant against the assignee. The plaintiff in such case is put to no more disadvantage than he would be by a defense of payment or want or failure of consideration, which may be always proved against an indorsee of a dishonored note. Indeed, it is substantially payment to show that the payee was indebted to an equal amount, and probably nine times out of ten, the items of an account filed were intended between the parties to go in discharge of the note. Notes and bills indorsed in time are not affected by this principle, and it is only such that the interest of the mercantile world requires should be protected. It were better perhaps that dishonored notes should not be negotiable, but assignable only in equity, so that the suit should be brought in the payee's name; but it being settled that they are negotiable, the interest of the makers should be regarded; for if by such indorsement the maker is deprived of his legal defense, nothing will be more easy than for the payee himself to avoid such defense by a friendly indorsement.

The case of *Clark v. Leach*, cited in the argument, rather favors than opposes this doctrine; for the defendant was not allowed to show in defense demands against the payee, because he had not brought himself within the statute by filing his account in the clerk's office; at least that is the only reason given by the court.

There is no other case in our books which touches this question. That of *Hallowell and Augusta Bank v. Howard*, 13 Mass. 235, is very wide of it. The action was upon a note payable to the bank, not negotiable but assigned to a creditor of the bank. The defendant moved for leave to pay into court bills and notes issued by the bank payable to the bearer, under the rule for bringing money into court. This was not allowed, because the notes were not money, nor money's worth; they being almost worthless, the bank having failed. Of course, the motion was rejected. If those notes had been filed in set-off, having come into the defendant's hands *bona fide* before the failure, without doubt they would have constituted a defense.

In the case before us, it being manifest that the plaintiffs acquired possession of the note sued long after according to the rules of law it was dishonored, and the defendant having filed demands, acknowledged to be just, more than equal to the sum sued for, we consider his defense maintained. That under the terms money paid a promissory note may be so filed, is settled in the case of *Holland v. Makepeace*; and that the defendant's having sued the same demands, does not deprive him of the defense, was settled in the case of *Evans v. Prosser*, 3 T. R. 186.

Defenses to note overdue: See *Lansing v. Gaine*, 3 Am. Dec. 422; *Bowman v. Halstead*, 12 Id. 380.

Defenses against, in hands of indorsee: *Ayer v. Hutchins*, 3 Am. Dec. 232; *Wilson v. Holmes*, 4 Id. 75; *Bay v. Coddington*, 9 Id. 368; note, 272.

JONES v. PERCIVAL.

[5 PICKERING, 435.]

EASEMENT—RIGHT OF WAY BY PRESCRIPTION.—A person does not have a right of way by prescription by passing over the lands of another in all directions, nor can a grant of such a way be presumed, however long continued.

TRESPASS *quare clausum fregit*. Pleas, right of way by prescription across plaintiff's land to defendants' where most convenient to defendants and least prejudicial to plaintiff; also right

of way by a non-existing grant. Replication *de sua injuria*, and issues joined thereon. It appeared that defendants for the purpose of removing hay from their marsh passed over plaintiff's marsh in different places and directions, not confining themselves to any particular course or cart-path. The defendants' testimony tended to show that the owners of defendants' marsh had for many years carted their hay over plaintiff's marsh, going wherever they pleased. The jury were instructed that the defendants might show such a way as was described in their pleas by prescription or grant, and that a grant might be presumed from an uninterrupted use of more than twenty years. Also that it was necessary for defendants to show a continued use of the right to pass in any direction over plaintiff's lands, where most convenient to them and least prejudicial to plaintiff; and it was not sufficient to show that defendants had used a way in a particular route. Verdict for defendant.

Plaintiff excepted to first instruction and moved for a new trial, because the verdict was against the weight of evidence upon the point of the last instruction.

Williams and Marston, for plaintiff.

Reed, for defendants, argued that it was a matter of necessity for one to pass over the land of another in removing hay. That the way claimed by defendants was not unreasonable: Com. Dig., Prescription, E. 4, and Chimin, D. 2, D. 4; *Campbell v. Wilson*, 3 East, 294; *Gayetty v. Bethune*, 14 Mass. 49 [7 Am. Dec. 188]; *Gateward's case*, 6 Co. 60; *Fitch v. Rawling*, 2 H. Bl. 393; 2 Bac. Abr. 234, Customs, C.; 1 Bl. Com. 77.

By Court, MORTON, J. It is true, as was contended by the defendant's counsel, that a custom for the owners of adjoining closes, not separated by partition fences, to turn their teams upon each other's land in plowing, is good. It enables the respective owners more conveniently and advantageously to improve their lands. It is also founded on reciprocity, and is promotive of husbandry; but a custom for the inhabitants of a certain place, or the owners of a certain close, to pass over the soil of another wherever it is most convenient to themselves, and least prejudicial to the owner, would be unreasonable. In practice it would lead to contention and litigation. The rights of the respective parties under such a custom are so undefined and doubtful, that the custom would be void for uncertainty.

In the case at bar, the right of passing is claimed as a way, and not by force of a custom. A way *ex vi termini* imports a

right of passing in a particular line. The way must be kept in repair by the owner of the easement, and not by the owner of the land over which it passes: *Taylor v. Whitehead*, 2 Doug. 749; 3 Kent's Com. (3 ed.) 424.

The practice of the defendants to pass over the plaintiff's close in different directions several times a year, however long continued, can neither establish a general right thus to use the close, nor a right of way over it in a specific course. Each entry, unless by permission of the plaintiff, was a trespass, and no number of entries, however great, upon different parts of the close, can raise a presumption of a grant, or establish a right by prescription.

A grant in the words of the defendant's plea would give to the grantee an election, subject to the restriction mentioned, of the place and course in which the way should, in the first instance, be located; but it would not authorize him afterwards, from year to year, or day to day, to change its course. Having been once established, any deviation from it would be a trespass.

Verdict set aside, and a new trial granted.

See, generally, as to right of way over another's land: *Pernam v. Wead*, 3 Am. Dec. 43; *Taylor v. Townsend*, 5 Id. 107; *Watson v. Bioren*, 7 Id. 617; *Coburn v. Richards*, 7 Id. 160. Right acquired by prescription: *Gayetty v. Bethune*, 7 Id. 188, note 193; *Lawton v. Rivers*, 13 Id. 742. Right acquired by express grant: *Gayetty v. Bethune*, *supra*. A right of way may also be created by necessity: *Lawton v. Rivers*, 13 Id. 742, note 747.

DOTY v. GORHAM.

[5 PICKERING, 487.]

LICENSE OF PURCHASER AT EXECUTION SALE.—A purchaser at an execution sale has a license to enter upon and remove a building placed on the plaintiff's land with his permission by the judgment-debtor.

EXECUTION SALE—AUTHORITY OF OFFICER PRESUMED.—A person levying an execution and making a sale of property in pursuance thereof, is presumed to be an officer properly authorized, and it is not necessary for a purchaser to show that such person was an officer *de jure*.

TRESPASS. Plaintiff alleged defendants entered his close and removed a shop which was his (plaintiff's) property. Pleas, the general issue and the shop was Gorham's property, and defendants entered and removed the same. Issue joined on plaintiff's traverse of the allegation of property in Gorham. At the trial it appeared that formerly the shop belonged to Coombs and that he moved it on the *locus in quo* and occupied it by plaintiff's per-

mission; that Gorham purchased the shop at an execution sale made by the defendant, Bassett, as a constable, on a judgment against Coombs. Plaintiff objected to the execution under which the sale was made, and the return thereon, because it did not appear that Bassett ever was appointed or qualified as constable. Objection overruled. The jury were instructed that if the shop was Coombs's, and was on plaintiff's close by his permission, and the property was legally transferred to Gorham, the latter had a right to enter with necessary aid and remove the shop, doing as little injury as possible, to which instruction plaintiff excepted.

Verdict for defendants; but if plaintiff's objection was improperly overruled, or the foregoing instruction erroneous, a new trial was to be granted, otherwise judgment on the verdict.

Wood, for plaintiff.

Holmes, jun., contra, cited 3 Stark. Ev. 1357; *Potter v. Luther*, 3 Johns. 431; 16 Vin. Abr. 114; 3 Cruise Dig. 159, tit. 25, sec. 74; *Doe v. Brawn*, 5 B. & A. 243; *Nason v. Dillingham*, 15 Mass. 170; *Buckman v. Ruggles*, Id. 180 [8 Am. Dec. 98].

By Court, MORTON, J. The shop was a chattel liable to attachment and seizure; and Gorham, the principal defendant, acquired a good title to it by his purchase under the constable's sale on the execution. The only objection to the validity of the sale is that it was not proved on the trial that the person who made it was legally elected and qualified to act as constable. It would be productive of great inconvenience to require purchasers at officers' sales to inquire into the regularity of the appointments and qualifications of those assuming to act as such. Titles acquired under the proceedings of sheriffs and constables can not be made to depend upon the purchasers' ability to prove that they were officers *de jure* as well as *de facto*: *Fowler v. Bebee*, 9 Mass. 231 [6 Am. Dec. 62]; 15 Id. 170; Id. 180 (Rand's ed. 183, n. a.); 5 Barn. & Ald. 243. The fact that one of the defendants, who acted as the servant of the purchaser, was the officer who made the sale, can make no difference in the application of this principle. He can not be holden to prove his title to his office in an action in which no complaint is made against him for any official act. The defendant, Gorham, having shown a valid title to the shop, the only question remaining is, whether he had a right to enter upon the plaintiff's close and remove it. The act was a trespass, unless such right may be inferred from the facts in the case.

Coombs, the debtor, having placed the shop upon the plaintiff's soil by his permission, was tenant at will of the land on which it stood. He had not only a right in the soil covered by the building, but also a right of ingress and egress over the plaintiff's close to and from the highway, as necessary to the enjoyment of the shop. There is no evidence of the determination of this tenancy at will. The shop being erected for the purposes of trade, the tenant had a right to remove it at any time during the continuance of the estate: *Elwes v. Maw*, 3 East, 52. And had the landlord determined the estate, the tenant would have been entitled to sufficient time to remove his shop and other property: *Rising v. Stannard*, 17 Mass. 282; *Ellis v. Paige*, 1 Pick. 43. The debtor, therefore, might rightfully have removed the shop while he continued to own it; and Gorham having acquired his property in the building and his right to the enjoyment of the soil, was guilty of no trespass in entering with the other defendants, as his servants, and removing the shop.

Judgment according to verdict.

See generally, as to nature of license and rights acquired by virtue of parol license: *Ricker v. Kelly*, 10 Am. Dec. 38 and note; and *Rerick v. Kern*, *post*, and note.

Authority of officers *de facto* recognized: *Fowler v. Bebee*, 6 Am. Dec. 62; *Buckman v. Ruggles*, 8 Id. 98.

INGLEE v. BOSWORTH.

[5 PICKERING, 498.]

ASSESSMENT MAY BE VALID IN PART.—An assessment of a tax is valid, and is not vitiated as to those that are liable although certain persons are assessed who are not liable to be taxed.

ASSESSORS LIABLE FOR PROPERTY TAKEN FOR ILLEGAL TAX.—Assessors are liable for taking property to pay a tax illegally assessed.

TRESPASS *de bonis asportatis*. Pleas, general issue and justification as parish assessors in Halifax. In November, 1824, the defendants, as assessors, made an assessment of three hundred and fifty dollars, voted to be raised by the parish for defraying certain expenses, the assessment being made upon the polls and estates of the inhabitants of the parish upon a valuation taken by them May, 1824, and returned the assessment for collection to the collector of the parish. After most of the tax assessed had been collected, defendants took the assessment

from the collector in order to re-assess the sum mentioned, because certain persons and estates which were supposed to belong in the parish when the assessment was made were subsequently held to belong in another parish. The second assessment was accordingly made, and the defendants returned the same with their warrant to the collector. The defendants were the assessors of the parish of Halifax during the years 1824, 1825 and 1826, and the same persons were collectors during those years. Plaintiff neglected to pay either tax; the collector, by virtue of the assessor's second warrant, distrained and sold plaintiff's steers.

The judge ruled that the re-assessment and warrant issued thereon were void, and directed a verdict for plaintiff. Defendant excepted. Defendant moved in arrest of judgment on the ground that trespass will not lie against assessors.

Eddy, for the motion, cited *Ingraham v. Doggett*, 5 Pick. 451; Stat. 1823, c. 138, sec. 5; 2 Bl. Com. 15; *Dillingham v. Snow*, 5 Mass. 559; *Bartlett v. Crozier*, 15 Johns. 250; *Seaman v. Patten*, 2 Cai. 312; *Sutton v. Clarke*, 6 Taun. 29.

Baylies, contra, cited *Agry v. Young*, 11 Mass. 220; *Pond v. Negus*, 3 Id. 230 [3 Am. Dec. 131].

By Court, MORTON, J. It was by virtue of the collector's warrant for the collection of the tax re-assessed that the distress was made; and the justification of the defendants rests upon the validity of this re-assessment. If the first tax was legally assessed, the re-assessment was void. The objection to the legality of the first assessment is, that the assessors, by mistake, included several persons who were not inhabitants of the parish nor liable to be taxed in it. The taxes against these individuals could not be collected. This would leave a deficit in the sum to be raised, but would not affect the relative proportions of the persons liable to taxation. The effect upon the parish would be the same if some persons legally assessed proved to be unable to pay their taxes. The deficiency could be supplied by increasing a subsequent tax.

The accidental omission of any taxable polls or estate, in the assessment of any county, town or parish tax, although it would increase the proportions which those assessed would be holden to pay, would not render the whole assessment void: 5 Mass. 547. In all towns it would be difficult, and in large ones almost impossible, for the most vigilant assessors to make any tax entirely correct, so that no polls or estate not liable to tax-

ation should be included, nor any which are liable should be omitted. To hold assessments to be void for these causes would be productive of immeasurable inconvenience in raising the revenues necessary to defray the expenses of the state, and of the counties, towns, and other corporations in it. We are therefore of opinion that the first tax was legally assessed and might have been enforced against all persons rightfully included in the lists.

Another question raised in the case is, whether the plaintiff was liable to be taxed for the year 1824, in the parish of which the defendants were the assessors. We think he was not. Assessments are made in reference to the first day of May. They are founded upon valuations taken by the assessors of each town and parish, which are intended to be correct invoices of the polls and estates in the respective towns and parishes liable to taxation on that day. Previous to the first day of May, 1824, the plaintiff had separated himself from the parish of which the defendants were the assessors, had joined a religious society in another town, and had furnished to the former parish the legal evidence of these facts. He thereby became liable to be taxed in the society which he joined, and was as much exempted from taxation in the parish which he left, as if he had actually removed without its territorial limits. If he remained liable to be taxed by the defendants, he was subject to taxation in two religious corporations at the same time, and holden to contribute towards the support of two religious teachers, upon the ministry of one of whom he did not attend. This would be alike unjust and inconsistent with that perfect freedom, in relation to religious opinions and the support of public worship, which is intended to be established and protected by the laws of this commonwealth.

The statute of 1823, c. 106, which prescribes the mode in which a member of one religious society may withdraw from it, and become a member of another, provides that the person withdrawing "shall remain liable to pay all such taxes as may have been actually granted or assessed against him previous to such separation." The plaintiff had not been actually assessed when he withdrew, and we think the tax had not been granted within the meaning of this statute, so as to render the plaintiff liable to be assessed for his proportion of it.

By recurring to the records which are referred to in the bill of exceptions it appears that the money to defray the parish expenses for the year 1823 was granted in the month of May of

that year. The vote passed April 27, 1824, to raise money to defray the parish expenses for that year, was prospective, and the tax was intended to be assessed upon a valuation to be made on the first of May following; otherwise the expenses of two years would be brought into one, and two successive taxes be founded upon one valuation. This can not be done: *Nason v. Whitney*, 1 Pick. 140 (2 ed. 144, n. 1). Any person becoming an inhabitant of the parish after the passing of this vote and before the first of May, would have been liable to be assessed his proportion of it. The tax was not actually granted so as to bind the plaintiff before the appropriation of the money at the adjourned meeting in May following. Until that time the whole subject was under the control of the parish, and the former vote might have been reconsidered and a different sum granted, or the parish might have omitted to make any grant: *Pond v. Negus*, 3 Mass. 233 [3 Am. Dec. 131].

The defendants do not bring themselves within the protection of the statute of 1823, c. 138, sec. 5. Although the money collected by this illegal distress, and paid into the parish treasury, might have been recovered back by an action for money had and received against the parish: *Amesbury W. & C. Manuf. Co. v. Amesbury*, 17 Mass. 461; *Sumner v. First Parish in Dorchester*, 4 Pick. 361; yet in that form of action the remedy might not have been commensurate with the injury, and the plaintiff was not bound to resort to that mode of redress. The defendants were not "required" by the parish to assess the money to be raised upon the polls and estates of any but taxable inhabitants of the parish; nor to re-assess a tax which had once been legally assessed: *Gage v. Currier*, 4 Pick. 399 (2 ed. 405, n. 1).

Judgment affirmed.

Assessors are liable for collecting a tax illegally assessed: *Stetson v. Kempton*, 7 Am. Dec. 145.

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

FULLER v. HUBBARD.

[6 COWEN, 13.]

VENDEE'S REMEDY ON BREACH OF CONTRACT TO CONVEY on payment of the purchase-money, where payment has been duly made, is by action on the contract, and he can not rescind the contract and sue for the purchase-money and interest.

VENDEE MUST DEMAND A CONVEYANCE in such a case, after paying or tendering the purchase-money, and must attend to receive it, after waiting a reasonable time for it to be made out.

ENGLISH RULE is, it seems, that the vendee must prepare the conveyance and tender it for execution.

AGREEMENT TO CONVEY IN FREE-SIMPLE is satisfied by a conveyance without covenants. Hence, the existence of a judgment against the vendor will not, at law, authorize the vendee to rescind the contract.

JUDGMENT ALONE DOES NOT TRANSFER TITLE or destroy the debtor's seisin and capacity to convey.

ASSUMPSIT by Fuller against the administrators of Smith, deceased, on a special contract made by the deceased to convey certain land to the plaintiff, the declaration containing also the money counts. The defendants pleaded a judgment outstanding against their intestate, recovered in 1815, and also *plene administravit*, except one dollar. Reply, praying judgment of assets *quando acciderint*. It appeared that the contract was made in writing, May 15, 1812, to convey the land to the plaintiff in fee-simple, on the payment of a certain sum down, and the residue in three annual payments; Smith, the vendor, having the right to elect to go on with the contract or not, if the payments were not made at the day. The whole consideration-money and interest were paid, the last payment being

made to the administrators of Smith, May 12, 1819. The defendants objected that the plaintiff could not recover on the money counts, and also that he could not recover without showing that he had prepared and tendered a deed to the heirs which they had refused or neglected to execute, or at least that a conveyance had been demanded and refused, but the objections were overruled. The defendants also offered to show that the plaintiff had been in possession since the contract, and had cut and sold a large amount of timber, which they insisted should be deducted from his claim. The evidence was rejected. Verdict for the plaintiff, under the direction of the court, for the consideration-money and interest. Motion for a new trial.

G. C. Bronson, for the motion, claimed: 1. That the plaintiff could not recover on the general counts: *Raymond v. Bearnard*, 12 Johns. 274 [7 Am. Dec. 317]; *Clark v. Smith*, 14 Id. 326; *Caswell v. Black River etc. Co.*, Id. 453; 1 Chit. Pl. 342; *Towers v. Barrett*, 1 T. R. 133; *Power v. Wells*, Cowp. 818; 4 Mass. 504; *Weston v. Downs*, Doug. 23; *Hunt v. Silk*, 5 East, 449; *Taylor v. Hare*, 4 Bos. & P. 260; 2 Phil. Ev. 64; 1 Wheat. Selw. 79; 2 Com. Con. 56; Sugd. Law of Vend. 206; *Linningdale v. Livingston*, 10 Johns. 36. 2. That plaintiff could not recover without showing that he had tendered a deed for execution, or at least that he had demanded one: Sugd. Law of Vend., 182, 296 (Phil. ed. 1820); *Parker v. Parmele*, 20 Johns. 130 [11 Am. Dec. 253]; *Phillips v. Fielding*, 2 H. Bl. 123; *Greenby v. Cheevers*, 9 Johns. 126. 3. That the court erred in rejecting the evidence offered by the defendants, and in the instructions as to the measure of damages: 4 Bos. & P. 262, *per* Heath, J.; 1 T. R. 136, *per* Buller, J.; *Hopkins v. Lee*, 6 Wheat. 109; *Dyer v. Hargrave*, 19 Ves. 510, 511,¹ *per* master of the rolls. 4. That the existence of the incumbrance was no obstacle to a conveyance good in form which would satisfy the contract: *Van Eps v. Schenectady*, 12 Johns. 436 [7 Am. Dec. 330]; *Nixon v. Hyserott*, 5 Id. 58; *Sedgwick v. Hollenback*, 7 Id. 376; *Stanard v. Eldridge*, 16 Id. 254.

J. A. Collier, *contra*, insisted: 1. That the plaintiff having performed the contract on his part by paying the purchase-money, was entitled to a conveyance, and a demand was unnecessary: *Shackleford v. Barrow*, 2 Bay, 91; *Baker v. Bulstrode*, 1 Mod. 104; *Pincke v. Curteis*, 4 Bro. Ch. 332; *Heard v. Wadham*, 1 East, 627; *Abbott*, *arguendo*; *Sweitzer v. Hummell*, 3 Serg. &

1. This should be 10 Ves. 510, 511.

B. 228; Lawes' Pl. in Assumpsit, 246; Com. Dig., Pleader C., 75; *Utica Bank v. Gieson*, 18 Johns. 485. So where conveyance and payment are to be simultaneous by the terms of the contract: *Green v. Reynolds*, 2 Johns. 207; *Jones v. Gardner*, 10 Id. 266; *Parker v. Parmele*, 20 Id. 130-135 [11 Am. Dec. 253]; *Heard v. Watts*, 1 East, 619;¹ 1 Saund. 320, c; *McCrady v. Brisbane*, 1 Nott & McC. 104 [9 Am. Dec. 676]; *Fairfax v. Lewis*, 2 Rand. 20, 35. 2. That the existence of the judgment against the intestate made it impossible for him or his heirs to make a conveyance according to the contract, and dispensed with the necessity of a demand, if it were otherwise necessary: *Seaward v. Willock*, 5 East, 198, 202; Sugd. Law of Vend. 164, 165 (Am. ed. 1820); *Greenby v. Cheever*, 9 Johns. 126; *Gillet v. Maynard*, 5 Id. 87, 88 [4 Am. Dec. 329]; *Judson v. Wass*, 11 Id. 527 [6 Am. Dec. 392]; *Tucker v. Woods*, 12 Id. 190 [7 Am. Dec. 305]; *Duke of St. Albans v. Gore*, 1 H. Bl. 279; *Gazley v. Price*, 16 Johns. 269; *Ketchum v. Evertson*, 13 Id. 364 [7 Am. Dec. 384]; 2 Chit. Pl. 125, note (i). 3. That if the contract could not be performed, the plaintiff might rescind it and recover on the money counts. 4. That the evidence relating to the cutting of the timber was inadmissible, because as the plaintiff had no right to enter, it was an attempt to set off damages by a tort, which could not be allowed: *Duncan v. Lyon*, 3 Johns. Ch. 358 [8 Am. Dec. 513]; *Livingston v. Livingston*, 4 Id. 292 [8 Am. Dec. 562]; and that an action for use and occupation would not lie in such a case: *Smith v. Stewart*, 6 Johns. 46 [5 Am. Dec. 186]. 5. That the measure of damages was the same as if the plaintiff had been ejected for a defect of title after having received a conveyance with covenants: 2 Wheat. 63, 65, note; and that if the plaintiff should be evicted by the heirs, then would be the time to adjust the mesne profits: *Murray v. Gouverneur*, 2 Johns. Cas. 438.

By Court, WOODWORTH, J. The plaintiff was not entitled to recover under the general counts. The special contract is still subsisting, and the remedy of the plaintiff is on the contract: *Clark v. Smith*, 14 Johns. 326. That the plaintiff had no right to rescind, follows from the conclusion (which we have come to on another point in the cause), that the outstanding judgment admitted by the pleadings was no obstacle in the way of performing the promise to convey according to its terms. The payments were made by the plaintiff upon the foot of the spe-

¹This should be *Heard v. Wadham*, 1 East, 619.

cial contract. Everything has gone on for a series of years upon the supposition that the agreement was valid and subsisting.

It is unnecessary to consider the question of damages; as we think the action can not be sustained on the contract, the purchaser not having put the vendor or his heirs in default. In this case, it was necessary for the plaintiff to show, at least, that he had demanded a conveyance from the heirs of Smith, the intestate; and that then, after awaiting a reasonable time for making out and executing it, he had offered to receive it. The English law is peculiarly strict. By this, it seems, the vendee, who sues for a breach of the contract to convey, is required, not merely to show payment of the purchase-money, he must also prove the preparation and tender of a conveyance ready for execution. Till this is done, the vendor is not put in default. In *Baxter v. Lewis*, Forest's Exch. 61, 62, on a bill filed by the vendor of land against the purchaser for a specific performance, the defendant was decreed to pay the purchase-money. He neglected to do so, and was attached. A motion being made to set aside the attachment, on the ground that, as the vendor had not prepared and tendered a conveyance, the defendant was not bound to pay; and the attachment was therefore premature. Pemberton, for the plaintiff, said: "It is the duty of the purchaser to make and tender a conveyance. The vendor is never called upon to do so." The court denied the motion, thinking it was incumbent on the defendant "to prepare and tender the conveyance, and pay the purchase-money." In *Knight v. Crockford*, 1 Esp. N. P. 190, on an objection by Adair, sergeant, that the plaintiff, a purchaser, could not recover on the contract in question, which consisted of a promise by the plaintiff to pay for, and of the defendant to convey real estate, because he had not shown the preparation and tender of a conveyance to the defendant; Eyre, C. J., did not question that the objection was according to the general rule, but distinguished the case, saying the defendant had incapacitated himself to convey by selling to another which rendered a strict performance on the part of the plaintiff unnecessary.

Mr. Sugden declares the rule of *Baxter v. Lewis*, to be the settled rule of the profession in England; and notwithstanding some dicta which he mentions to the contrary, he still infers that the purchaser, and not the vendor, ought to prepare and tender the conveyance: Sugd. L. V. 181, 182, (Am. ed. 1820.) Sugden agrees that the contrary was the general rule when the

simplicity of the common law reigned, and possession was the best evidence of title, but upon the modifications of estates unknown to the common law, which resulted in the difficulties surrounding modern titles, the more convenient rule which he mentions had grown up among the conveyancers. This doctrine of Sugden is mentioned with approbation by the late Chief Justice Spencer, in *Hudson v. Swift*, 20 Johns. 27, and the court decide in that case that to put the vendor in default, and entitle the vendee to recover back part of the purchase-money, which he had paid in advance, he must tender the residue, and demand a conveyance.

There is, then, something more to be done than the simple payment or the tender of the purchase-money. A conveyance must be demanded. Nor would this alone appear to satisfy the principle of the rule. A reasonable time should be allowed to the vendor to prepare the conveyance. The purchaser not having himself prepared it (which he may do), he shall not be allowed to retire immediately and bring his action; but should present himself to receive the conveyance, which he has thus required to be furnished. Deliberation and advice of counsel may be necessary in settling its terms. The framing and execution of modern conveyances, even with us, where the titles to real estate are much less complicated than in England, are not like the payment of money, or the delivery of a chattel. I admit the general rule to be, as contended by the counsel for the plaintiff, that where a party engages to do any act, and a demand is not a part of the contract, the bringing of the action is in itself a sufficient demand. Such an important transaction, however, as the assuring of a title to real estate, under the modern system of conveyancing, is an exception to that rule.

Clearly the judgment recovered against Smith is no ground, in a court of law, for rescinding the contract. The agreement was to convey in fee-simple. A conveyance is good and perfect, without warranty or personal covenants. Such a conveyance will satisfy the terms of this contract. The judgment is of itself no transfer of title. It does not destroy the seisin of Smith, or his heirs, nor take away the capacity to convey: 5 Johns. 58; 7 Id. 380; 13 Id. 363; 20 Id. 133; 12 Id. 443; 9 Id. 126.

A new trial must be granted, with costs, to abide the event.

New trial granted.

VENDEE'S DUTY AS TO DEMANDING DEED.—The rule here announced, that where there is a contract to convey on the payment of money, or the

performance of other conditions by the vendee, the latter, in order to put the vendor in default and maintain an action on the contract, must not only pay or perform, or tender payment or performance, but also demand a conveyance, and, after waiting a reasonable time for its preparation, attend to receive it, has been approved and followed in a number of subsequent cases in New York: *Fuller v. Williams*, 7 Cow. 54, which was the second decision in the supreme court in the same cause: *Hacket v. Huson*, 3 Wend. 250; *Connelly v. Pierce*, 7 Id. 131; *Lawrence v. Simons*, 4 Barb. 358; *Lutweller v. Linnell*, 12 Id. 516; *Garlock v. Lane*, 15 Id. 364; *Wells v. Smith*, 2 Edw. Ch. 81; *Bruce v. Tilson*, 25 N. Y. 196. But in *Pearson v. Frazer*, 14 Barb. 569, it was held that this was a rule of evidence and not of pleading, and therefore that the vendee need not allege that he had demanded a deed and attended, after a reasonable time, to receive it. As the object of waiting a reasonable time, after the first demand, is to enable the vendor to prepare the conveyance, it was held in *Wells v. Smith*, 2 Edw. Ch. 81, that if the vendee himself prepare the deed and tender it for execution, no further demand or delay will be required: See, also, *Camp v. Morse*, 5 Denio, 164. And where the vendor has covenanted to convey on a particular day, if the money is paid by that time, the vendee having fully and seasonably performed the contract on his part, need make only one demand for the deed; for it is the duty of the vendor to have it ready on the day: *Carpenter v. Brown*, 6 Barb. 149. In *Gray v. Dougherty*, 25 Cal. 279, Sanderson, C. J., refers to *Carpenter v. Brown*, as having modified the doctrine of *Fuller v. Hubbard*, "so as to dispense with the second request," in every case, but the decision does not seem to go to that length. The general doctrine of the principal case, that where the stipulations of a contract are dependent or concurrent, neither party can maintain an action on the contract without performance or tender thereof on his own part and a demand of performance from the other party, is approved in *Slocum v. Despard*, 8 Wend. 619; *Hoyt v. Hall*, 3 Bosw. 59; *Hartley v. James*, 50 N. Y. 53; and *People v. Mills*, 17 Cal. 276. And in *Barber v. Cary*, 11 Barb. 553, the rule that where deeds or other writings are to be prepared, reasonable time must be given for that purpose, after a demand, is applied.

VENDEE CAN NOT RESCIND AFTER PAYMENT.—On this point the principal case is cited in *Corper v. Brown*, 2 McLean, 498. It is erroneously referred to in that case as holding that in New York it is the duty of the vendee to prepare the deed and tender it for execution, and the learned judge states that the rule in Ohio is that the vendor must make and tender the deed.

CONTRACT TO CONVEY IN FEE, HOW SATISFIED.—It was held in *Ryder v. Jenny*, 2 Rob. (N. Y.) 68, on the authority of *Fuller v. Hubbard*, that an agreement to convey in fee is satisfied by a deed without covenants. But where the contract was to convey free of incumbrances and with full warranty, it was held in *Jerome v. Scudder*, Id. 174, that a tender of performance by the vendor would be unavailing if the land was in fact incumbered. The doctrine of the principal case, that a contract to convey in fee may be satisfied by a conveyance of an incumbered title, is not now followed in New York or elsewhere: *Penfield v. Clark*, 62 Barb. 584; *Burwell v. Jackson*, 9 N. Y. 591. As to the conveyance which will satisfy a contract generally, see the note to *Porter v. Noyes*, 11 Am. Dec. 34; *Parker v. Parmele*, Id. 253, and note; *Borden v. Borden*, 4 Id. 32; *Fleming v. Harrison*, Id. 691; *Kelly v. Bradford*, 6 Id. 656; *Ketchum v. Evertson*, 7 Id. 384; *Dearth v. Williamson*, Id. 652; *Judson v. Wass*, 6 Id. 392.

TRUSTEES OF VERNON SOCIETY v. HILLS.

[6 COWEN, 23.]

A CORPORATION SUING must prove its incorporation where the general issue is pleaded.

TRUSTEES OF A CORPORATION CHOSEN FOR A YEAR hold over until others are elected.

IRREGULARITIES RENDERING VOID AN ELECTION OF TRUSTEES of a corporation for a single year, will not dissolve the corporation where only one third of the trustees are chosen annually; but it is otherwise where the irregularities are continued for three years.

TRUSTEES CHOSEN AFTER THE DAY are in by color of office, and the election is not absolutely void. Hence their acts are good, and the corporation continues.

ESTOPPEL OF ONE DEALING WITH A CORPORATION to deny that it is a corporation relates only to the time of the contract, and does not prevent his claiming that such corporation was afterwards dissolved.

NON-USER OR MISUSER WORKING A FORFEITURE of corporate rights can not be taken advantage of collaterally in an action brought by the corporation, but such forfeiture must be judicially declared in a direct proceeding for that purpose.

RELIGIOUS CORPORATIONS stand on the same footing in this respect as other corporate bodies.

OBJECTION TO THE RIGHT OF TRUSTEES suing *colore officii*, that they were not regularly elected, can not be sustained unless it be shown that proceedings have been instituted against them by the government and carried to judgment of ouster.

CERTIORARI to justice's court. The plaintiffs sued below on a subscription dated September 25, 1817, whereby the defendant bound himself to pay a certain sum annually for the support of the minister of the society. Plea, the general issue. The question was as to whether the plaintiffs were a corporation when the action was brought. It was admitted that the society was duly incorporated, and that all its proceedings down to April, 1813, were regular, or had been cured by statute; but since that time, it appeared that at the annual elections of trustees only one person had presided instead of two, as required by statute, and that the required certificate of the result of such elections had not been given. It also appeared that there was no record of an annual meeting of the society in 1818, or of any meeting at all in that year, except a resolution adopted in 1820, reciting that the record of 1818 was lost, and directing the clerk to record the election of trustees for that year. No certificate of the election of the plaintiffs as trustees was produced, but it appeared from the minute-book of

the society produced in evidence that they were trustees. Judgment below was for the defendant.

G. C. Bronson, for the plaintiffs in error, contended: 1. That none of the irregularities pointed out were such as to work a dissolution of the corporation; 2. That trustees hold over until their successors are chosen: *People v. Runkle*, 9 Johns. 147; 3. That the defendant having contracted with the society as a corporation was estopped to deny that it was a corporation: 14 Johns. 245 [*Dutchess Mfg. Co. v. Davis*, 7 Am. Dec. 459]; 4. That even if the irregularities mentioned were such non-user or misuser as to work a forfeiture they could not be taken advantage of except by a direct proceeding to declare the forfeiture: 1 Bl. Com. 485; *Slee v. Bloom*, 5 Johns. Ch. 366; S. C., 19 Johns. 456 [10 Am. Dec. 273], and cases there cited.

J. A. Spencer, *contra*, claimed: 1. That the plaintiffs must prove themselves a corporation on the general issue: 8 Johns. 378; 2. That the irregularities in the election of trustees rendered the election void, and worked a dissolution of the corporation; 3. That a direct proceeding was not necessary to try the question of the dissolution of a religious corporation, which must be prepared in all suits to show a continuance of its corporate existence.

By Court, SAVAGE, C. J. It is settled by the repeated decisions of this court, that when a corporation sues they are bound, on the general issue, to prove that they are a corporation: 8 Johns. 378; 14 Id. 245, 246. Had the irregularities complained of been confined to a single year, they would have had no effect upon the plaintiffs' rights, according to the decision in *The People v. Runkle*, 9 Johns. 147, 149. It was conceded by the court in that case, that the trustees chosen under the act in question, and who go out of office at the end of the year, hold over till others are elected. The question there was, whether an election after the day was good. The court said: "Perhaps the language of the statute is too peremptory, that the seats of one third are to be vacated at the expiration of every year; but the corporation is not thereby dissolved, for two thirds of the trustees continue in office."

There are cases which hold that where an officer is to be chosen annually, he may hold over after the year until another is chosen: 10 Mod. 146; Str. 625. And in *The People v. Runkle*, the court said that trustees elected after the day would be in by color of office; that the election would not be void, and

their acts would be good; that the corporation would still remain, and the irregularity, if any, would cure itself in a subsequent year. That reasoning, however, is not applicable to this case. The persons claiming to be a corporation in 1817, where the contract was made with them as such, came into the office, if at all, since that period. The same irregularity was continued for three years in succession, and if it renders the election void, the corporation was dissolved, or in a situation to be dissolved by appropriate judicial proceedings. For the same reason, the defendant is not estopped to question the plaintiffs being a corporation, by reason of his contract with them as such. The estoppel, if any, relates to the time of entering into the contract, and does not admit that there can not be a dissolution. This view of the subject renders it necessary to inquire whether such a non-user or misuser, as is a sufficient ground to produce a forfeiture of corporate rights, can be taken advantage of in this collateral way, or whether the forfeiture must not first be judicially declared in a direct proceeding by the people.

This point, I think, is well settled by the decisions of our own as well as those of the English courts. In *Slee v. Bloom*, 5 Johns. Ch. 379, 381, Chancellor Kent held that the forfeiture of corporate rights must be judicially ascertained and declared, and that corporate power, which may have been abused or abandoned, can not be taken away but by regular process. He considers the cases, and expresses a belief that there is no instance of calling in question the rights of a corporation as a body, for the purpose of declaring its franchises forfeited and lost, but at the instance and on behalf of the government. The decree in *Slee v. Bloom* was reversed in the court for the correction of errors [10 Am. Dec. 273], not, however, on the ground that the chancellor's position, so far as it related to acts of non-user or misuser, was incorrect. Spencer, C. J., who gave the almost unanimous opinion of the court, said: "Upon the authorities, and for the reasons given by the chancellor, misuser or non-user can not be relied on as a substantive and specific ground of dissolution." But the reversal proceeded upon the fact that the corporation in question had surrendered or done what was equivalent to a surrender of their corporate rights.

These cases seem to me conclusive against allowing the objection, coming, as it does, collaterally, that this corporation was dissolved. There is nothing in the statute showing that the legislature considered religious incorporations as standing on a different footing in this respect from other corporate bodies.

The plaintiffs have acted as trustees upon the matter in question, and in bringing their suit, *colore officii*, and before an objection to their right can be sustained by the defendant, on the ground that they were not regularly elected, he must show that proceedings have been instituted against them by the government and carried on to a judgment of ouster: 9 Johns. 159.

In my opinion, the judgment below was erroneous and should be reversed.

Judgment reversed.

COOK v. SATTERLEE.

[6 COWEN, 108.]

ESSENTIAL QUALITIES OF A BILL OR NOTE are: 1. That it be payable at all events, and not contingently or out of a particular fund; and, 2. That it be for the payment of money only, and not for the performance of any other act or in the alternative.

ORDER PAYABLE ON TAKING UP MAKER'S NOTE.—An order drawn by A. directing B. to pay C. or bearer a certain sum, "and take up A.'s note for that amount," is payable on a contingency, and is not a bill of exchange even though accepted.

ASSUMPSIT on a certain instrument, declared on as a bill of exchange, dated July 25, 1825, whereby W. F. and C. E. Clarke, the drawers, directed the defendants, ninety days after date, to pay the plaintiff or bearer four hundred dollars, and take up their note given to William and Henry B. Cook for that amount, dated April 19, 1825, which was accepted by the defendants on the same day. General demurrer and joinder.

E. Cowen, for the demurrer.

E. Griffin, *contra*.

By Court, SAVAGE, C. J. The essential qualities of a bill or note are: 1. That it be payable at all events, not dependent on any contingency, nor payable out of a particular fund; and, 2. That it be for the payment of money only, and not for the performance of some other act, or in the alternative: Chit. on Bills, 55.

Is not the instrument declared on payable upon a contingency? From the face of the instrument itself it appears that the drawers had, on the nineteenth of April preceding its date, given their note for four hundred dollars to Wm. and H. B. Cook, and the object of drawing the instrument in question was to take up that note. The engagement of the acceptors must

be construed according to what is required of them by the drawers. The note was supposed to be in possession of the payee or holder of the bill, and the payment of the money and taking up of the note of the drawers must be simultaneous acts. The acceptors could not take up the note till it was presented; nor were they bound to pay the money till the plaintiff was ready and offered to enable them to take up the note. It seems to me, therefore, that substantially this instrument is payable upon a contingency, and is the same as if it had said: "Pay W. C. four hundred dollars on his giving up our note," etc. Had such been the form, it would clearly not be technically a bill of exchange. The holder, in declaring upon it, should aver his readiness to deliver up the note. Upon a contrary doctrine, the defendants may be compelled to pay the bill, and the drawers to pay the note; provided it has been transferred before due.

The defendants are entitled to judgment, with leave to amend on the usual terms.

Rule accordingly.

REQUISITES OF BILL OR NOTE.—The statement given by Savage, C. J., *supra*, of the "essential qualities" of a bill or note is approved in *Bell v. Yates*, 33 Barb. 639; *Dunham v. Manrow*, 2 N. Y. 543, and *Arnold v. Rock River etc. R. R. Co.*, 5 Duer, 213; and particularly as to the point that such bill or note must be payable in money only, in *Thompson v. Sloan*, 23 Wend. 73; and *Hinnemann v. Rosenback*, 39 N. Y. 101. In *Leonard v. Mason*, 1 Wend. 523, it was held that although an order to pay a certain sum and take up the drawer's note was not a bill of exchange, as decided in the principal case, yet a request written at the bottom of a promissory note for its payment was a good bill. As to what instruments are negotiable, generally, see the note to *Woolley v. Sergeant*, 14 Am. Dec. 421.

CHAPMAN v. LATHROP.

[6 COWEN, 110.]

DELIVERY OF GOODS TO A PURCHASER on a fair contract, without any fraudulent contrivance to obtain possession, passes the property, and the vendor can not maintain trover for such goods in case of non-payment of the purchase-money.

WHERE ONE SELLS GOODS TO BE PAID FOR IN CASH, no time of payment being specified, payment and delivery are simultaneous acts, and the vendor may refuse to part with the goods until payment.

DELIVERY WITHOUT PAYMENT in such a case passes the property, and the vendee may avail himself of any legal set-off, notwithstanding his agreement to pay ready money.

VENDOR MAY STOP GOODS *in transitu*, before actual delivery, on the vendee's becoming bankrupt.

ABSOLUTE DELIVERY OF GOODS sold is a waiver of antecedent conditions.

VENDEE OFFERING PAYMENT IN NOTES of the vendor, after delivery of the goods, where he has promised to pay cash, is not guilty of fraud if he did not contemplate payment in such notes at the time of the purchase or delivery.

TROVER for certain goods. It appeared that the defendant agreed to purchase the goods in question of the plaintiffs and to pay for them in cash or current bills if the plaintiffs would sell them as low as possible, to which the plaintiffs consented, and the goods were delivered on the same day. The next day the defendant's clerk called and offered to pay for the goods, partly in a note indorsed by the plaintiffs and regularly protested for non-payment, and the balance in cash, which the plaintiffs refused. About a fortnight afterwards the plaintiffs demanded the goods of the defendant, which demand was refused. It appeared that the note offered in payment was given for certain horses purchased by Northrop, the maker, and delivered to one of the plaintiffs. The defendant also offered to prove that the plaintiffs had indorsed other notes, to a large amount, for Northrop, and having received the property purchased with them had stopped payment with the avowed purpose of preventing collection by the holders of the notes; but the evidence was rejected.

The judge instructed the jury that if the goods were sold on the understanding that they were to be paid for in cash or current bills, or if the plaintiffs were induced to part with them on misrepresentations or deceptions of the defendant, under circumstances against which common prudence could not guard, the plaintiffs were entitled to a verdict; to which instructions the defendant excepted. Verdict for the plaintiffs for the value of the goods, with interest. Motion for a new trial.

I. Hamilton, for the motion.

S. S. Lush, contra.

By Court, **SAVAGE, C. J.** The principal question is, whether trover will lie upon the facts proved. If there was a fair contract for the goods, and they were delivered to the purchaser without any fraudulent contrivance on his part to obtain possession, the property passed, and the plaintiffs' remedy is by a different action. It is conceded that the plaintiffs were entitled to pay for the goods upon delivery. They might have refused to part with the goods until payment. Where no time is agreed on for payment, the delivery and payment are to be simultane-

ous acts. But if the vendor delivers the goods to the vendee, and the latter omits to pay, the property of the goods is changed. If the vendee becomes bankrupt while the goods are on their passage, but before actual delivery, the vendor may stop them *in transitu*: 2 Com. on Con. 221; Cooke B. L. c. 8, secs. 17, 18.

In case of an agreement to pay down for goods, if the vendor deliver the goods without actual payment, the vendee may avail himself of any legal set-off, notwithstanding the agreement to pay ready money: *Ibid.*; 1 East, 375. In *Hussey v. Thornton*, 4 Mass. 405 [3 Am. Dec. 224], the plaintiffs had agreed to sell a quantity of candles to T. & W., on credit, and on their giving security. The agent of T. & W. received the candles on board a vessel through the hands of cartmen sent by him. While part of the candles were on the wharf, and part on board the vessel, one of the plaintiffs appeared and said he should consider the candles the property of the plaintiffs, until security was given; to which the agent assented. These candles were attached by the defendants as the property of T. & W.; and the question was, whether they were so. Parsons, C. J., states the inquiry to be, whether this was an absolute delivery, not revocable; or if revocable, yet not revoked. "We think," said he, "they, the plaintiffs, were bound to recollect the condition they had themselves made, and not to have delivered the candles until it had been complied with." The court, however, decided the cause, on the ground that the agent had accepted of a conditional delivery; and, therefore, the property remained in the vendors. But the decision would have been different if the goods had been sold or attached while in possession of T. & W. According to the doctrine of this case, the absolute delivery of the property is a waiver of any contract antecedently made.

In *McCarty v. Vickery*, 12 Johns. 348, this court decided that trespass would not lie, where the vendor had parted with the possession, even though by fraud. They add, the property was changed by the delivery. In 5 T. R. 231, Mr. Justice Buller cites the case of *Haswell v. Hunt*, where Lacey, in the morning, purchased some tobacco of the plaintiffs to be paid for in cash, and then went off to France to absent himself from his creditors. The tobacco was delivered by the plaintiffs' servants, at Lacey's house, without demanding the money or having any orders to do it. Eyre, C. J., held that the sale was made complete by the act of the plaintiffs; that by delivering the goods without demanding the money, the property was vested in Lacey as

upon a complete sale *ab initio*, without ready money. That was a much stronger case than the present.

Suppose the plaintiffs' note had never been presented, but that after a fortnight had elapsed they had sent a bill of the goods, and the defendant had omitted to pay; could it be pretended that trover would lie? If so, the vendor has only to make his contract for cash, and may then pursue the property, whose hands soever it may reach, at any length of time not barring an action upon the statute of limitations. The proposition is monstrous. As to fraud, it seems to me if there be any in the case, it is on the side of the plaintiffs. The judge admitted that the defendant acted under an erroneous opinion of his rights; and yet charged the jury that his conduct might be fraudulent. The fraud, I presume, was that of paying the plaintiffs with their own paper. If that be fraudulent, it must be admitted that the defendant is guilty. But there is no evidence in the case showing that he contemplated making such a payment, when he purchased the goods or when he received them.

The case of *Palmer v. Hand*, [7 Am. Dec. 392], is not in point. The purchaser in that case never received the delivery of the lumber, but while the hands were piling it he defrauded the defendant of nearly the value of it, and absconded. I find no case which will warrant a recovery in this action, nor is it sustainable upon any principle of law.

I think the judge erred; and there must be a new trial, with costs to abide the event.

New trial granted.

DELIVERY WITHOUT PAYMENT PASSES TITLE.—The principle established in the above decision, that an absolute delivery of goods to a purchaser without payment of the price, or the performance of other conditions of the sale, where such delivery is not procured by fraud or contrivance, passes the title to the property, has been approved in many subsequent cases: *People v. Haynes*, 14 Wend. 565, *per* Tracy, Senator; *Fitch v. Beach*, 15 Id. 225; *Russell v. Minor*, 22 Id. 664; *Furness v. Hone*, 8 Id. 263, *per* Maynard, Senator; *Lupin v. Marie*, 6 Id. 81; *Shindler v. Houston*, 1 Denio, 51; *Ives v. Humphreys*, 1 E. D. Smith, 199; *Smith v. Lynes*, 3 Sandf. 208; S. C., 5 N. Y. 44. And the vendor must look to the personal credit of the purchaser: *Lupin v. Marie*, 2 Paige, 172. But such delivery does not waive the vendor's right to immediate payment: *Genin v. Tompkins*, 12 Wend. 280. If the goods were delivered to a carrier, and the circumstances indicate that the vendor did not intend to release all claim to the goods and to trust to the personal credit of the purchaser, the title does not pass: *Baker v. Bourcicault*, 1 Daly, 27; *Currie v. White*, 6 Abb. Pr. (N. S.) 375; S. C., 37 How. Pr. 353. And although, as laid down in *Chapman v. Lathrop*, *supra*, where a vendor delivers goods sold for cash without insisting on payment, and the purchaser afterwards offers payment in a note against the vendor, the latter can not, after a con-

siderable delay, rescind the contract and demand the return of the goods, it seems to have been thought by Bronson, J., in *Hogan v. Shorb*, 24 Wend. 460, that it might be otherwise if the vendor should act promptly upon discovering that the purchaser does not intend to pay cash. He says: "It may perhaps be an open question whether the vendor, immediately after the delivery and when he first discovers that the vendee does not intend to abide by his contract to pay cash, may not disaffirm the sale and bring trover for the goods, if they still remain in the hands of the vendee." And he refers to the vendor's delay in the principal case as constituting an important ground of the decision.

CONTRACT TO PAY CASH ON DELIVERY.—Where, on a sale of goods, the contract is silent as to the time of payment, payment must be made on delivery in legal currency: *Clark v. Dales*, 20 Wend. 61, citing the principal case. But it was held in *Conway v. Bush*, 4 Barb. 565, that the doctrine of *Chapman v. Lathrop* did not authorize a purchaser in such a case to sue for the goods before making payment.

WARD v. GREEN.

[6 COWEN, 173.]

LAWFUL CONTRACTS OF A MASTER of a general ship, relative to the usual employment of the vessel, are binding upon the owners.

THE MASTER IS THE CONFIDENTIAL AGENT of the owners at large, intrusted with the conduct and management of the ship.

A GENERAL SHIP is one in which the master or owners engage separately with a number of persons unconnected with each other, to convey their respective goods to the place of the ship's destination.

MASTER OF A GENERAL SHIP ABROAD has power to make contracts in relation to freight which will be binding on the owners.

OWNER ON BOARD exclusively attending to the shipment of the cargo, is not bound by the master's contracts, but to exempt himself from liability he must show that he was exclusively attending to that business.

OWNERS ARE LIABLE FOR GOODS STOLEN on the voyage which were shipped on a contract with the master, without their knowledge, and which were not put on the freight list, although one of the owners was on board as supercargo, but not shown to have been exclusively attending to the shipment of the cargo.

ERROR to the common pleas in an action of assumpsit brought by the defendant in error, who was plaintiff below, against the plaintiffs in error, who were defendants below. It appeared that the plaintiff shipped two hundred and seventy Spanish dollars on the defendant's ship *Morgiana*, from New Orleans, under a contract with the master to deliver them to the plaintiff at New York, "dangers of the seas excepted," "one and one half per cent. primage," and that they were stolen on the voyage. It was proved by the defendants that the dollars were not on the freight list; that they were shipped without the

knowledge of Henry Ward, one of the defendants and part-owners, who sailed as supercargo on that voyage; that the plaintiff himself was a passenger on the vessel, and that the receipt for his passage-money was signed by the said Henry Ward. The substance of the judge's instructions appears from the following opinion. Verdict for the plaintiff, and the defendants sued out this writ of error on exceptions to the charge of the court.

J. L. Graham, for the plaintiffs in error, to show that the owners were not liable on the master's contract because one of the owners was on board acting as supercargo, of which the plaintiff had notice, and because the contract was made without the knowledge of said supercargo, cited *Waller v. Brewer*, 11 Mass. 99; *Boucher v. Lawson*, Rep. temp. Hardw. 83; Id. 183; Poth. Mar. Cont. Cush. ed. 27.

P. W. Radcliff, contra, cited *King v. Lenox*, 19 Johns. 235; Abb. Ship., pt. 2, c. 2, secs. 2, 3, 4; *Waller v. Brewer*, 11 Mass. 99.

By Court, SAVAGE, C. J. Abbot on Shipping, in treating of the liability of the owners on the contracts of the master, states that the owners are bound to the performance of every lawful contract made by the master, relative to the usual employment of the ship. The master is the confidential agent of the owners at large, and is intrusted with the conduct and management of the ship. It often happens that no contract can be made with the owners personally, as where the ship is in a place distinct from their residence. But even when the ship is at the place of their residence, and is intended to be employed as a general ship, it rarely happens that the owners interfere with the receipt of the cargo; and without doubt they are legally bound to perform every contract made by the master relative to the usual employment of such a ship: Abb. Ship., pt. 2, c. 2, secs. 2, 3, 4.

A general ship is defined to be one in which the master or owners engage separately with a number of persons, unconnected with each other, to convey their respective goods to the place of the ship's destination. There can be no doubt that in this case the ship was a general one; and the owners are liable for the performance of the master's contract, unless they are discharged by reason of one of the owners being present at New Orleans, and acting as supercargo. The case of *Boucher v. Lawson*, Rep. temp. Hardw. 83, 183; Abb. Ship. 119, S. C., was an action against the owner to recover the value of

Portugal coin, delivered to the master at Lisbon, to be conveyed to London; and of which, by the usage of that particular trade, the master was to receive the freight to his own use, and which he had embezzled. The court held that if it had appeared that the ship was employed in carrying goods for hire, the owner would have been answerable for the loss. But as that did not appear, and possibly the ship might have been sent for a special purpose, the master could not charge the owners by taking in goods contrary to his duty.

In the case of *King v. Lenox*, 19 Johns. 236, the general liability of the owners is asserted as I have before stated it; but in that case the owner was held not responsible, because the ship was freighted wholly by him. The master therefore had no authority to receive the goods on freight. The contract was consequently deemed to be made with the master in his individual capacity, and not as agent of the owners. In the case of *Walter v. Brewer*, 11 Mass. 99, the owner went in the ship, intending to freight her himself. The ship was not advertised for freight, nor did she bring any from Montevideo; but the cargo belonged to the owner, except the bales of skins which the master received from the plaintiff and stowed away secretly. The judge instructed the jury that the owners were generally liable on the contracts of the master abroad on the voyage; but as the owner had gone in the ship to procure a cargo; as the ship was not put up for freight; and as the defendant was not consulted, but the goods were taken on board without his knowledge, he was not liable. But had the owners known of the shipment of the goods before he left Montevideo, he would have been accountable.

On a motion for a new trial, the court concurred generally in the doctrine pronounced at the trial, that the owner is not liable for goods clandestinely taken on board by the master, the former being present, and having the management of the voyage himself, leaving nothing to the master but the care of sailing and directing the ship, especially when the ship is not a freighting ship. But even under such circumstances the court declared they would hold the owner liable, if he knew the goods were received on board upon freight. And the judge delivering the opinion of the court concurs with the doctrine of *King v. Lenox*, that in such a case it is reasonable that the owner of goods, who avails himself of the master's privilege, should be holden to trust to his individual responsibility. In neither of these cases was the ship a general one. And Abbot thinks it makes no dif-

ference that the goods are taken as a part of the master's privilege, because it is immaterial whether he is paid by a privilege or by wages.

The case under consideration is not like either of those cited. Here the ship was a general one. She was freighted by sundry persons. The cargo did not belong to the owner. The master, therefore, had authority to receive goods on freight, unless he was prohibited by the owners' presence. I can see no error in the opinion of the judge who delivered the charge in the court below. He stated that the master of a vessel, when abroad, is the agent of the owners, and has power to make contracts in relation to freight, which are binding upon the owners. That when an owner is on board, and exclusively attending to the shipment of the cargo, he is not bound by the master's contract. But to relieve himself from liability, he must show the fact that he was exclusively attending to the shipment of the cargo. This doctrine seems to me to be supported by the authorities referred to, and is reasonable in itself. If the jury did not correctly apply the law to the facts of the case, the remedy is not by bill of exceptions and writ of error. I am of opinion that the judgment of the court below should be affirmed.

Judgment affirmed.

OWNER'S LIABILITY FOR MASTER'S CONTRACTS.—See, on this point, *Reynolds v. Toppan*, 8 Am. Dec. 110, where it is held that a ship-owner is liable for the contracts of the master, if the vessel is in the employment of the owner, and the master has been appointed by him and has acted within the scope of his authority. See, also, *Thompson v. Snow*, ante, 263, and *Emery v. Hersey*, ante, 268; *Sager v. Nichols*, 1 Daly, 2; and *Joy v. Allen*, 2 Wood. & M. 316, 318. In the two decisions last referred to, the principal case is cited, and its authority on this subject recognized.

OWNER OF HIRED VESSEL, LIABILITY OF.—For an examination of the decisions on this subject, see the note to *Pittkin v. Brainerd*, 13 Am. Dec. 87.

MUMFORD v. BROWN.

[6 COWEN, 475.]

TENANT CANNOT MAKE REPAIRS at the landlord's expense, without a special agreement between them authorizing it.

TENANT IN COMMON IS NOT LIABLE FOR REPAIRS made by a co-tenant upon the common property, without a previous request and refusal to join in making such repairs, even though the repairs be proper and necessary.

ERROR to the common pleas, to reverse a judgment rendered in favor of the defendant in error and against the

plaintiff in error on an appeal to that court from a judgment recovered before a justice, in an action there brought by the defendant in error for money paid and work done in repairing certain premises of which the parties were tenants in common. From the bill of exceptions, it appeared that the parties were tenants in common of a certain lot; that the plaintiff, now defendant in error, being in the actual possession under a lease for one year from the defendant for his half, built a new fence on the lot, in place of one which had rotted down; said fence being a substantial benefit, and increasing the rental value of the lot enough to pay for the repairs; and that the defendant lived within three miles of the lot, and was frequently in the village where it lay. But it did not appear that the defendant had ever been requested to join in the repairs, or that he ever expressly requested, assented to, or promised to pay for, said repairs. The claim was for one half the value of the repairs. A motion for a nonsuit in the common pleas was overruled, and the plaintiff had a verdict and judgment thereon, to reverse which this writ of error was prosecuted.

Talcott, Attorney-general, for the plaintiff in error.

L. F. Stevens, contra.

By Court, SAVAGE, C. J. Clearly the defendant below was not liable as landlord. It was not in the power of a tenant to make repairs at the expense of his landlord, unless there be a special agreement between them authorizing him to do this. The tenant takes the premises for better and for worse, and can not involve his landlord in expense for repairs, without his consent.

It is, however, a different question, whether the defendant below was not liable as tenant in common, for such repairs as were necessary to preserve the property. The ancient mode of proceeding by one tenant in common against his co-tenant, who refused to repair, was by writ *de reparatione facienda*, a remedy which probably still exists. A recovery could be had by this writ only in case of refusal to repair; and admitting that the action of assumpsit has superseded the ancient proceeding, should not the plaintiff below have shown a request and refusal. In *Doane v. Badger*, 12 Mass. 65, it was decided that one claiming a privilege in a well and pump, situate in the land of another, each being bound to contribute to the repairs, can have no action for repairs against him whose land the well is in, until after a request and refusal to repair. Jackson, J., who

delivered the unanimous opinion of the court, said, that considering the parties as tenants in common, with no prescription or special contract as to repairs, it was clear the action could not be sustained, without a request by the plaintiff to the defendant to join in making the repairs. He says the action on the case seems to be a substitute for the old writ *de reparatione facienda*. But he adds: "If two co-tenants tacitly agree or permit the house or its appurtenances to go to decay, neither can complain of the other until after a request and refusal to join in making the repairs." The reason upon which he founds this position seems to be conclusive. It is that till such request and refusal, both tenants are in equal fault, one having as much reason to complain as the other.

In *Loring v. Bacon*, 4 Mass. 275,¹ it appeared that the plaintiff owned the upper and the defendant the lower story of a house. The plaintiff repaired the roof after requesting the defendant to join in the repairs; and then sued to recover the defendant's alleged proportion. The court held that the plaintiff could not recover. The parties were considered, not as tenants in common, but owners in severalty of the parts occupied by each. But the principle was recognized, that tenants in common may be compelled to repair by the writ *de reparatione facienda*; and also that if one suffer his separate property to go to decay to the injury of another, a writ may be obtained to compel him to repair it; and that after an injury sustained, an action on the case lies. That case was very different from this; and no inference can be drawn from it affecting the question now before the court.

I know of no adjudication or principle by which one shall be compelled to pay another for services rendered, without request or assent, expressed or implied. The plaintiff in error is not liable on the count for money paid, because it was without his assent; nor is he liable as co-tenant, because he was not in fault, having never been requested to make the repairs. That the repairs were proper and necessary, does not alter the case.

The judgment must be reversed.

Judgment reversed.

LIABILITY OF LANDLORD FOR REPAIRS.—The principle established in the foregoing decision that a landlord is not liable for repairs of leased premises without an express contract to that effect, but that the tenant must take them for better or worse, is approved in a number of subsequent cases in New York and elsewhere: *Cleves v. Willoughby*, 7 Hill, 90; *Academy of Music*

1. This should be *Loring v. Bacon*, 4 Mass. 575.

v. *Hackett*, 2 Hilt. 235, per Hilton, J.; *Gottsberger v. Railway*, Id. 344; *Bloomer v. Merrill*, 29 How. Pr. 262, *Sheets v. Selden*, 7 Wall. 423.

THAT A TENANT IN COMMON IS NOT LIABLE FOR REPAIRS made by his co-tenant upon the common property without his consent, or without a request to join in them, however necessary such repairs may be, is held on the authority of the principal case in *Taylor v. Baldwin*, 10 Barb. 590; per Allen, J., S. C., Id. 629. The same doctrine is laid down in *Calvert v. Aldrich*, 99 Mass. 77, where, also, it is held that the ancient writ *de reparatione facienda* lay only to compel a co-tenant to join in making repairs, and not to enforce liability for repairs already made, and the dictum in the principal case to the contrary is denied. In *Hannan v. Osborn*, 4 Paige, 343, it is held, however, that where a suit for an account for rents and profits is brought against a tenant in common in possession, by his co-tenant, he may deduct sums paid for taxes, assessments and ordinary repairs, and that there is nothing to the contrary in the doctrine of the principal case. This is upon the general equitable principle that one who seeks equity must do equity, and that where a party comes into a court of chancery to demand rents and profits of a *bona fide* occupant of land, he must pay for meliorations.

WELCH v. HICKS.

[6 COWEN, 504.]

FREIGHT PRO RATA ITINERIS is due where a ship is disabled by perils of the sea from pursuing its voyage, without the master's fault, and puts into an intermediate port, and the owner there receives his goods.

ACCEPTANCE OF GOODS MUST BE VOLUNTARY to give a right to *pro rata* freight.

MASTER'S REFUSAL TO REPAIR his ship, or to procure others and send on the goods, entitles the owner to receive the goods at the intermediate port without paying freight *pro rata*.

WHERE MASTER AT FIRST REFUSED TO REPAIR the ship and proceed with the voyage, or to procure other vessels and forward the goods, but afterwards consented to repair and proceed, under circumstances calculated to excite doubts of his sincerity, and the owner then received his goods, it is for the jury to decide whether the offer to repair was *bona fide*, and the acceptance was voluntary, so as to entitle the ship to *pro rata* freight.

ASSUMPSIT for freight on certain goods shipped by the defendant on the plaintiff's ship, from St. Petersburg to New York, but received by the defendant at Princetown, Massachusetts, the ship having been compelled to put into said port by the violence of winds and tempests. There were counts both for full freight and for *pro rata* freight. There was no controversy as to the shipment or acceptance of the goods, but the question was whether the defendant had received them under such circumstances as to make him liable for freight. It appeared that the defendant, on learning that the ship had put

into Princetown, sent his agent there with full power in relation to the goods. The agent testified that when he arrived at Princetown, December 15, 1820, the ship was capable, in his own opinion, of being taken to Boston, twelve or fifteen leagues distant, where she could have been repaired in a fortnight, at a moderate expense, and carried the goods on to New York; that there were other vessels at Princetown which could have been engaged to forward the goods, of which he informed the master; that the master refused to repair the ship and proceed, or to procure other vessels to carry the goods, until he heard from his owner, or to deliver the goods to the witness, except upon payment of full freight; that these refusals were continued to January 5, notwithstanding repeated applications by the witness; that about December 21, the master said he had received orders to discharge the crew, and that he did discharge them between that date and January 1; that about a fortnight after the witness' arrival, the harbor became blocked with ice; that on January 5, the master told the witness that he intended to repair the ship at Princetown, but the witness did not believe him sincere, owing to the difficulty of making the repairs; that the repairs could not then be made in a reasonable time, and that the goods were in a perishable condition; that the master still refused for some time to forward them; that an agreement was made with the witness for the delivery of the goods to him on his giving an order on his principal for the whole freight; but that afterwards they were delivered unconditionally, and the witness forwarded them to New York. The defendant also offered to prove that the cost of transporting the goods from Princetown to New York exceeded the full freight from St. Petersburg to New York, but the evidence was rejected.

The judge charged the jury in substance that the defendant having received the goods at an intermediate port the law necessarily implied an agreement on his part to pay *pro rata* freight, without reference to the ability or willingness of the master to repair the ship in a reasonable time, or to procure other vessels to forward the goods; that the defendant could only escape his liability for *pro rata* freight by showing an express and positive agreement by the master to discharge all claim for freight; and that the defendant's remedy was to abandon the goods, if he did not choose to receive them at the intermediate port, and to go for damages. Verdict for the plaintiff. Motion by the defendant for a new trial, founded on exceptions to the instructions.

G. Griffin, for the motion, claimed: 1. That the defendant was not liable for *pro rata* freight unless his acceptance of the goods was voluntary: *Luke v. Lyde*, 2 Burr. 885; S. C., 1 W. Bl. 190; *Cook v. Jennings*, 7 T. R. 377, 381; *Mulloy v. Backer*, 5 East, 316; *Liddard v. Lopes*, 10 Id. 526; *Armroyd v. Union Ins. Co.*, 3 Binn. 437, 447, *per* Yeates, J.; *Marine Ins. Co. v. Union Ins. Co.*, 9 Johns. 186; *Post v. Robertson*, 1 Id. 24; *Bradhurst v. Col. Ins. Co.*, 9 Id. 19; *Callender v. Ins. Co. of N. America*, 5 Binn. 525; *Case v. Baltimore Ins. Co.*, 7 Cranch, 358; *Hurtin v. Union Ins. Co.*, 1 Cond. Marsh. 281 *a*, note; *Robinson v. Marine Ins. Co.*, 2 Johns. 323; 2. That if the defendant was liable, the action on the new contract being an equitable one, he was entitled to set off against the *pro rata* freight the cost of transporting the goods from Princetown to New York: 3 Chit. Com. Law, 414; *Coffin v. Storer*, 5 Mass. 252 [4 Am. Dec. 54]; 3. That the master having refused to do what was in his power to forward the goods, the contract on the plaintiff's part was broken, and freight should either be denied or equitably reduced: *Hunter v. Prinsep*, 10 East, 394, *per* Lord Ellenborough; *Portland Bank v. Stubbs*, 6 Mass. 422 [4 Am. Dec. 151]; *Osgood v. Groning*, 2 Campb. 466.

J. Duer, *contra*, to support the judge's charge, relied on Abb. Ship., 336; Story's ed. pt. 3, c. 7, sec. 2.

By Court, SUTHERLAND, J. This court has repeatedly held that freight *pro rata itineris* is due where a ship, in consequence of the perils of the sea, without any fault of the master, goes into a port short of her destination, and is unable to prosecute the voyage, and the goods are received by the owner at such intermediate port: 2 Cai. 21; 1 Johns. 27; 2 Id. 323, 336; 9 Id. 19, 20, 186. This principle has been adopted from the decisions of the English courts, commencing with *Luke v. Lyde*, 2 Burr. 882, and continued without any essential conflict or contrariety down to the present time: 7 T. R. 381; 5 East, 316; 10 Id. 393, 526; 2 Campb. 466; 3 Binn. 448; 5 Id. 525; 7 Cranch, 358; 1 Marsh. 281, note.

The general principle is not disputed by the defendant's counsel. On the other hand, it is conceded, that where the master refuses to repair his ship, and send on the goods, or to procure other vessels for the purpose, and the owner of the goods then receives them, that this is not such an acceptance of the goods as will entitle the ship-owner to a *pro rata* freight. It is not a voluntary acceptance. He does not elect to receive his goods at the intermediate port, and sell them there, or become

his own carrier to the port of destination. He does not assent to the termination of the voyage at the intermediate port; but it having been terminated there against his will, by the refusal of the master to send on his goods to the port of destination, he does not, he receiving them under such circumstances in judgment of law, promise to pay the freight to the intermediate port.

The judge, in his charge to the jury, entirely excluded the question, whether the acceptance of the goods was voluntary or not, and instructed them that the fact of receiving the goods under any circumstances rendered the owner liable for a *pro rata* freight, unless he could show an express and positive agreement of the master at the time of the delivery of the goods, to waive and discharge all claim to the freight. In this, I think he erred. The cases already cited, particularly those in 9 Johns., show that in order to raise an implied assumpsit in such cases, the acceptance must be voluntary. No other rule would be consonant with justice and equity; but the master did finally declare his election to repair his ship, and send on the goods, and they were agreed to be received by the defendant's agent, after such declaration had been made to him. This was at first, upon the express condition of his giving an order on the defendant for the freight; but finally they were delivered and received without any such condition. These circumstances are claimed to be sufficient to sustain the verdict; and it is said, admitting the judge's charge to be incorrect, as it goes beyond the facts, a new trial should not, for that reason, be granted. Under the circumstances of the case, the agent might well have supposed that there was no *bona fide* intention to repair. He swears that such was his opinion, and that the goods were finally delivered unconditionally; that is, as I understand him, without any order having been given for the freight.

I think the judge should have left it to the jury to determine, whether the master did intend to repair the vessel, and complete the voyage, and whether the acceptance of the goods by the agent of the defendant was voluntary or not.

New trial granted.

THAT VOLUNTARY ACCEPTANCE OF GOODS by the shipper, at an intermediate port of necessity, discharges the carrier and entitles him to *pro rata* freight, is held on the authority of *Welch v. Hicks* in *Center v. American Ins. of New York*, 7 Cowen, 584; *Hinsdell v. Weed*, 5 Denio, 176; *Smyth v. Wright*, 15 Barb. 53; and *Weston v. Minot*, 3 Wood. & M. 444. So, in *Propeller Mohawk*, 8 Wall. 161. But there must be a voluntary election to receive the goods short of the port of delivery: *Atlantic Mut. Ins. v. Bird*, 2 Bosw. 204; *Bork v. Norton*, 2 McLean, 430.

EX PARTE JENNINGS.

[6 COWEN, 518.]

TAKING PRIVATE PROPERTY FOR PUBLIC USE.—Individual property can not be taken, or individual rights impaired, for public use, without just compensation.

OWNER OF A LIMITED INTEREST in property so taken, is entitled to compensation in proportion to his interest.

INTEREST IN A STREAM OF WATER taken for public use is a subject for compensation.

RIGHT TO THE FLOW OF WATER over land is commensurate with the interest in the land.

GRANT BOUNDED ON NON-NAVIGABLE STREAM.—A grant of land by the state bounded, in terms, on the margin of a stream above tide-water, extends to the thread of the stream, unless there is an express reservation of the property in the stream.

GRANT BOUNDED ON NAVIGABLE RIVER extends only to high water-mark.

NAVIGABLE RIVER, in a legal sense, is one in which the tide ebbs and flows.

EASEMENT IN STREAMS ABOVE TIDE-WATER.—In streams above the ebb and flow of the tide, which are in fact capable of navigation, the public has an easement or right of passage, as in a highway, and the right of the riparian owner is subject to this easement.

MANDAMUS LIES TO COMPEL APPRAISERS to appraise property taken for public use where they refuse to do so.

ALTERNATIVE MANDAMUS may issue in such a case to give the appraisers an opportunity to put the facts on record by their return where the question is deemed of sufficient importance to render a review on error desirable.

MOTION for a mandamus based upon an affidavit of the relator, showing the following facts: The relator, before the construction of the Erie canal, was in possession, claiming to be the owner in fee, of certain hydraulic works on the margin of Chittenango creek, and operated by the waters of the creek, consisting of a flouring mill, two saw-mills, etc., which he claimed to be of the value of ten thousand dollars. While he was thus in possession, the waters of said creek and of its tributaries, above his works, were taken into the Erie canal as a feeder; since which time the state has used the surplus water of said creek and its tributaries for its own benefit at the salt works at Salina, or has disposed of it to private persons wishing to run hydraulic works, they paying an annual revenue therefor. These operations have rendered relator's works nearly useless. About four years ago the relator applied to the canal commissioners and requested them, pursuant to the statute, to appraise his damages from the diversion of said water, but they neglected to do so. In 1825, after the passage of the act appointing a board of appraisers, he applied to them for the same purpose, and re-

peated the application several times afterwards. In July last he laid before them his claim for damages, but they absolutely refused to make any appraisement, to allow any damages or to take any action on the subject. The mandamus now applied for was to compel them to make an appraisement. Mr. Henry Seymour, one of the canal commissioners, and a member of the board of appraisers, made an affidavit that the ground of the refusal to make the appraisement asked for by the relator was, that the relator held under a grant from the state, which was bounded "on the margin of the stream," and that the land covered by the water of the stream still belonged to the state.

A motion was also made at the same time for a mandamus on behalf of one Egglestone, who claimed damages from the same cause, he being in possession of land and works on the same stream under a contract to convey. Both motions were heard together.

Edwards and Randall for the motions, contended: 1. That even if the grants under which the relators held extended only to the margin of the stream, they were nevertheless entitled to the uninterrupted flow of the water by their land: *Angell on Water-courses*, 5, 29; *Merritt v. Parker*, Id. App. 134; Co. Lit. 261, a; *Mayor of Hull v. Barnes*, Cowp. 102; *Bealey v. Shaw*, 6 East, 208; 2. That a grant bounded on a fresh water river or creek extends to the center of the stream, and entitles the owner to the uninterrupted flow of the water: *Angell on Water-courses*, 15, 37, 39; *Palmer v. Mulligan*, 3 Cai. 319 [2 Am. Dec. 270]; Dav. 152, 155, 157; 12 Mod. 510; 17 Johns. 195 [*People v. Platt*, 8 Am. Dec. 382]; 20 Id. 90 [*Hooker v. Cummings*, 11 Am. Dec. 249]; 2 Conn. 481; *Jackson v. Louw*, 12 Johns. 252; though it is otherwise as to lands bounded on streams and arms of the sea in which the tide ebbs and flows: Co. Lit. 261 a; 2 Bl. Com. 262; 3. That private rights cannot be impaired by the state without providing compensation: *Angell on Water-courses*, 53, 54; Grot. bk. 8, c. 14, sec. 7; Puff. bk. 8, c. 5, sec. 7; 1 Bl. Com. 141; 2 Johns. Ch. 162 [*Gardner v. Newburgh*, 7 Am. Dec. 526.]

S. Beardsley, contra, claimed: 1. That the appraisers had no jurisdiction to make the appraisement, because this was not a case of the taking of "lands, waters or streams," such as may be given or granted to the people, as contemplated by the act, and because in this case the fee-simple could not vest in the state since water could not admit of ownership, and besides

Eglestone had no legal estate; 2. That the creek in question was a public stream, being in fact navigable, and the soil under it never having been disposed of by the state, which had expressly bounded its grant on the margin; 3. That as the appraisers had a discretion in this case, it could not be controlled by mandamus: 19 Johns. 262 [*Hull v. Supervisors*, 10 Am. Dec. 223]; 12 Id. 415; 2 Cow. 444.

By COURT. By the third section of "an act respecting navigable communications between the great western and northern lakes, and the Atlantic ocean:" Sess. 40, c. 262. The canal commissioners are authorized to take possession of and use any "lands, waters, and streams," necessary for the prosecution of the improvements intended by the act; and by the same section, the commissioners of appraisal, are "to make a just and equitable estimate and appraisal of the loss and damage, if any, over and above the benefit and advantage to the respective owners and proprietors, or parties interested in the premises so required, etc., by and in consequence of making and constructing any of the works aforesaid." It is admitted that the principles of appraisal have not been changed by any subsequent act.

In this, and the subsequent act, there is ample provision, we think, for allowing compensation for all damages to private property occasioned by the canal commissioners in the prosecution of their duties, whether such damage be direct or consequential. Waters and streams in which the relators claim an interest are taken for the use of the canal. It is a case within the very words of the act. If not so, if it were a question of construction, there can be no doubt that such construction should be most liberal in favor of private right. Individual property can not be taken; or, which is the same thing, individual rights impaired, for the benefit of the public, without just compensation. Such is the language of the common law, and of the constitution. It would be derogating from the justice of the legislature to suppose they would stop short of providing for the compensation in such a case.

Whatever interest the claimant of damages may have, he is to be paid for, and the state then succeeds to his right. The state becomes a purchaser. True, the same section which provides for the appraisal, etc., says this acquisition shall be in fee-simple; but this may well be, though the individual claimant may have only a limited interest, a particular estate, for instance; or a right merely equitable, the reversion or legal estate residing elsewhere. If so, when the whole shall be paid for, the

whole will vest in the state. The question as to the extent and value of interest, is one for the appraisers, and respects the amount of damages, and the persons to whom they are to be paid. We see no more difficulty in describing and entering in a book the various interests which different persons may have in the flow of water, whether immediate, reversionary, legal or equitable, than in designating the like interests in land. It can not be allowed, because the estate is less than a fee, or because it is merely incidental to, or issuing out of land, that, therefore, the owner shall be divested of his right without compensation. The right to the flow of water over land, is commensurate with the interest in the land. It many times constitutes the main value of the property; and is accordingly made the subject of compensation and acquisition by the very terms of the statute. A conventional transfer of such a right by grant, would no doubt be valid.

There can be no doubt that a mandamus is the proper remedy. This is not the case of error in the act of appraisal; but the commissioners have refused to make any appraisal whatever. This is not denied; and a mandamus is asked for, commanding the appraisers to proceed, and value the interests of the relators at what they are worth. So much as to the preliminary objections. These were considered by the counsel, and are, indeed, of minor consequence compared with the question of right, which is put by the appraisers on the construction to be given to the state grant of the lands bordering on the Chitteningo. The objection is contained in the affidavits of Mr. Seymour, "that, in point of fact, the state had not parted with the land upon which the Chitteningo passes at the places claimed, but had bounded purchases of land on the margin of the stream; so that, as he believes, and he believes the other appraisers were satisfied of the fact being so, the state was still the owner of the land covered by the waters of the stream, and had not parted with it, or contracted to part with it to any person whatever; or authorized the use of the water for hydraulic purposes at the places in question." If the construction set up by the commissioners be the true one, if the state owns the land covered by the water, it is clear that though the relators may be entitled to the use of the water flowing by, and touching upon them, for all ordinary purposes, yet they can not build mills upon and raise the water of the stream. They are trespassers; and the state may claim not only the water, but the mills themselves, so far as they encroach upon the stream.

We do not, however, entertain a doubt that the appraisers have misapprehended the construction of the state grants. It is not pretended that the Chitteningo is a navigable creek or river, where the tide ebbs and flows. Such is notoriously not the fact. The decisions upon the construction of grants bordering on streams are numerous in the reports, not only of this, but of other states, and of England; and so far as they proceed upon the common law, they are uniform. The cases have generally arisen upon disputes concerning the rights of fishery; and though relating to rivers of the first magnitude, where the public have an acknowledged right of passage for rafts, boats, etc., yet the owners of land on the margin, above tide-water, have been allowed the several and exclusive right of fishery to the center of the stream opposite their respective farms; and where their land lies on both sides, they have been allowed the same right in the whole river, so far as their farms extend.

It is not necessary to go into the various cases on this subject. They are mostly cited upon the argument. They proceed upon the principle that the owner of the land on the margin owns the bed over which the river passes; and though it be nominally and in terms bounded on the margin, it extends by construction of law to the center of the stream. The public right is one of passage, and nothing more, as in a common highway. It is called by the cases an easement; and the proprietor of the adjoining land has a right to use the land and water of the river in any way not inconsistent with this easement. If he make any erection rendering the passage of boats, etc., inconvenient or unsafe, he is guilty of a nuisance; and this is the only restriction which the law imposes upon him. It follows that neither the state nor any individual has a right to divert the stream, or render it less useful or valuable to the owner of the soil. If the state had intended to retain the property in the stream, they should have inserted an express reservation or exception in their grants.

An opposite rule prevails in the construction of grants bounded on the margin of navigable rivers. By the term navigable river, the law does not mean such as is navigable in common parlance. The smallest creek may be so to a certain extent as well as the largest river, without being legally a navigable stream. The term has in law a technical meaning, and applies to all streams, rivers, or arms of the sea where the tide ebbs and flows. A public grant bounded on the margin of such waters extends by construction no farther than high water

mark, and leaves, as to the rest, an absolute proprietary interest in the public. Above the flow of the tide the river becomes private, either absolutely so or subject to the public right of way, accordingly as it is a small or a large stream.

In this case we decide that the grant as set forth by Mr. Seymour carried the land to the middle of the creek; and that therefore the interest is out of the state. We think the relators have shown an interest which entitles them to an appraisal; and it is for the appraisers to determine its extent on the bearing before them.

Rule for a peremptory mandamus. The above arguments and decisions were at August term last. The following rule was entered in the case of Egleston:

On reading and filing the affidavit of Darius Eglestone, showing that he is in possession of a lot of land and mill situated on the Chitteningo creek, in the town of Sullivan; that the water had been diverted from the said creek for the use of the Erie canal; that he has made application to Henry Seymour, David Woods and Joseph D. Selden, to estimate and appraise the damages which the said Darius has sustained on occasion of the diversion of the said creek; and that the said appraisers refuse to make any appraisal or estimate of said damages; and on reading and filing the affidavit of Henry Seymour, explaining the reasons why the said appraisers refuse to appraise and estimate said damages; on motion of Mr. N. P. Randall, and the same being argued by him on behalf of the relator, and by Mr. Beardsley on behalf of the said appraisers; and it appearing to the court that the said Darius has an interest in the premises, which entitles him to an appraisement of damages, if any have been in fact sustained; it is therefore ordered that a mandamus issue, to be directed to the said Henry Seymour, David Woods, and Joseph D. Selden, commanding them to proceed to appraise and estimate the damages of the said Darius Eglestone, on occasion of the taking of the waters of the said creek for the use of the Erie canal over and above the benefit and advantage to the said Darius, by and in consequence of making and constructing the said canal. A similar rule was entered in the cause *ex rel. Jennings*.

A motion was subsequently made on behalf of the canal appraisers to vacate the rule for a peremptory mandamus, and, at most, to grant only an alternative mandamus, so as to bring up the whole facts on the return.

Talcott, Attorney-general, and Beardsley, for the motion.

Randall and Edwards, contra.

SAVAGE, C. J., remarked that the main question made at the last term related to the extent of the boundary. The court were then of the opinion that it carried the land to the center of the stream. Nothing which had fallen from the attorney-general on the re-argument had changed their opinion upon this point. Objections that a mandamus will not lie, and that the relators do not make out their case, are now started; but we adhere to the opinion, that the case is one to which the remedy by mandamus is applicable, and that the case is sufficiently made out in evidence. We understand the appraisers refused to act because they thought the bed of the Chitteningo belonged to the state, that they therefore had no jurisdiction, private property not being invaded. We hold otherwise; that private property has been invaded; that they have jurisdiction, and should go on and appraise. To what particular individuals the property may belong, is a question for them to decide.

It is, however, suggested that the question is an important one, on account of the amount of the property involved in it, and that it should be put in such a shape as to be reviewed on error, should the state desire this. We think the suggestion perfectly right, and with a view to that object we direct the former rule and subsequent proceedings to be vacated, and that an alternative mandamus issue. This will enable the appraisers to put the facts on the record by a return, if they shall be so advised; and the judgment to be rendered on that return may be reviewed.

Rule accordingly.

GRANTS ON NON-NAVIGABLE STREAMS.—The doctrine of the above decision that grants of land bounded on streams, in which the tide does not ebb and flow, extend to the *filum aquæ*, has been recognized and approved in many subsequent cases: *Case v. Haight*, 3 Wend. 635; *People v. Canal Appraisers*, 5 Id. 448; *People v. Canal Appraisers*, 13 Id. 371; *Starr v. Child*, 20 Id. 152; *Walton v. Tift*, 14 Barb. 219; *Lowndes v. Dickerson*, 34 Barb. 592; *Varick v. Smith*, 5 Paige, 143. Indeed the soundness of the rule is unquestionable in its application to small streams, which are not in fact navigable, such as the Chitteningo creek in the foregoing case. But since the elaborate opinion of Davies, J., in *People v. Canal Appraisers*, 33 N. Y. 468, it may perhaps be regarded as settled in New York that the common law rule on this subject does not apply to large rivers which are in fact navigable, but in which the tide does not ebb and flow, but that grants bounded on such streams extend only to the margin of the water. And this is the prevalent doctrine in the United States: See the notes to *Hooker v. Cummings*, 11 Am. Dec. 253, and *Arnold v. Mundy*, 10 Id. 356.

The rule of the principal case on this point was held also by Hogeboom, J., to be applicable to lands bounded on streets and highways, in *Wetmore v. Law*, 34 Barb. 520; S. C., 22 How. Pr. 134, and in *People v. Law*, 34 Barb. 501; S. C., 22 How. Pr. 115.

THE PRINCIPAL CASE IS RECOGNIZED as authority, also, on the following points: That a stream so small as to be incapable of beneficial navigation belongs exclusively to the owners of the lands through which they run: *Curtis v. Keesler*, 14 Barb. 517; that the public have an easement or right of passage in fresh water rivers capable of useful navigation: *Harris v. Thompson*, 9 Barb. 360; *Morgan v. King*, 18 Id. 285; S. C., 30 Id. 15; 35 N. Y. 458; as to the right to take oysters in public waters: *Sloop Martha Ann*, Olcott, 22; as to the propriety of mandamus as a remedy in cases of this sort: *Canal Commissioners v. People*, 5 Wend. 428; *People v. Steele*, 2 Barb. 417; S. C., 1 Edm. 551; *People v. Canal Board*, 13 Barb. 441.

JACKSON EX DEM. BRADT v. WHITBECK.

[6 COWEN, 632.]

ACTUAL OUSTER BY TENANT IN COMMON may be presumed from his exclusive possession of the premises under claim of title for forty years, without any assertion of right or claim to any share in the profits on the part of his co-tenants, and an ejectment by them will be barred.

VERDICT SUBJECT TO THE OPINION OF THE COURT upon facts stated authorizes the court to draw the same conclusions from such facts as the jury would have been entitled to draw.

EJECTMENT. Verdict for the plaintiff, subject to the opinion of the court on the following facts: The lessors of the plaintiff claimed the premises as children and heirs of Bernardus Bradt. The defendant claimed under Hendrick, one of the sons of the said Bernardus Bradt. Bernardus moved off the premises about 1783, leaving Hendrick in possession, who continued to occupy the same until his death, about a year before the trial. The said Hendrick always openly asserted his title to the premises and dealt with them as his own, claiming and receiving all the profits thereof. He said his father had given him the land, and had directed him to get a deed drawn and he would sign it, but that he had neglected to attend to it owing to his youth and inexperience. Bernardus died about forty years before the trial. There was no evidence that Hendrick's title had ever been questioned, or that his brothers and sisters, who, after their father's death, had always lived within thirty or forty miles of the premises, had ever set up any claim thereto, until certain proceedings in partition had been instituted, about fifteen years before the trial. The result of those proceedings was not stated.

A. Van Vetchten, for the plaintiff.

J. V. Henry, *contra*.

By Court, SUTHERLAND, J. Without determining whether a claim of title under a parol gift is sufficient to lay the foundation of an adverse possession, *vid.* 13 Johns. 120, it appears to me that, admitting the premises in question to have descended to the children of Bernardus Bradt as tenants in common, the evidence in the case warrants the presumption of an actual ouster of his co-tenants by Hendrick. Here has been an exclusive possession, under claim of title, for forty years, without any assertion of right, or claim to any portion of the profits of the premises, on the part of his co-tenants, although they all resided in the same county, within forty miles of the premises.

In *Doe v. Prosser*, Cowp. 217, it was held that thirty-six years sole and uninterrupted possession by one tenant in common, without any account to or claim by his companion, was a sufficient ground for a jury to presume an actual ouster of the co-tenant. Lord Mansfield says: "The possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companions, because such possession is not adverse to his right but in support of their common title; and by paying him his share he acknowledges him to be tenant. Nor is a refusal to pay without denying his title sufficient. But if upon demand by the co-tenant of his moiety, the other refuses to pay and denies his title, saying he claims the whole and will not pay, and continues in possession, such possession is adverse, and ouster enough." "In this case," he continues, "no evidence whatsoever appears of any account demanded, or of any payment of rents and profits, or of any claim by the lessors of the plaintiff, or of any acknowledgment of a title in them or in those under whom they would now set up a right. I am therefore clearly of opinion that an undisturbed and quiet possession for such a length of time, is sufficient ground for a jury to presume an actual ouster." Aston, J., says: "In this case there has been a sole and quiet possession for forty years by one tenant in common only, without any demand or claim of any account by the other, and without any payment to him during that time. What is adverse possession or ouster if the uninterrupted receipt of the rents and profits without any account for nearly forty years is not?" Willes and Ashurst, JJ., expressed the same opinion. That case was in no respect a stronger one for the defendant than the one at bar.

So in *Van Dyck v. Van Buren*, 1 Cai. 84,¹ the same doctrine was held; that a sole possession under claim of right for forty years, by one tenant in common amounts to an ouster; not that the jury might presume it from this fact, but that the law raises the presumption, and the jury were not at liberty to resist it. Whether it be a presumption of fact, to be found by the jury, as was held in *Doe v. Prosser*, or a presumption of law to be drawn by the court, as was said in *Van Dyck v. Van Buren*, is not material in this case, for the verdict being subject to the opinion of the court, we are substituted for the jury, and have the right to draw the same conclusion from the testimony, which the jury, in the opinion of the court, would have been authorized to draw.

We are, therefore, of opinion, that the defendant is entitled to judgment.

Judgment for the defendant.

OUTER BY CO-TENANT.—See, on this point, *Gillaspie v. Osburn*, 13 Am. Dec. 136, and note. The principal case is referred to as an authority on this subject in *Jackson v. Tibbits*, 9 Cow. 252.

MILLER v. PLUMB.

[6 COWEN, 665.]

RECORD SHOWING A CONTINUANCE to October term, with an award of venire to December term, and then stating "at which day came the parties, etc., and the jurors," etc., must be understood to mean that the parties and jurors appeared at December term.

MISCONTINUANCE IS CURED by the statute of jeofails.

GENERAL RULE AS TO FIXTURES is that whatever is annexed to the freehold becomes part of it, and can not be removed.

EXCEPTIONS HAVE BEEN ADMITTED between landlord and tenant, and between tenant for life or in tail, and the reversioner, from motives of public policy.

BETWEEN VENDOR AND VENDEE, and between executor and heir, the general rule holds, and fixtures annexed by the vendor or ancestor, even for purposes of trade, pass with the realty.

POTASH KETTLES SET IN MASONRY, appertaining to an ashery, though not fastened to the building, are fixtures, and pass to a vendee of the realty.

CONVERSION, EVIDENCE OF.—Where a vendee takes possession and lets the premises, together with the use of chattels thereon belonging to the vendor, and receives pay for such use, there is sufficient evidence of a conversion.

DAMAGES IN TROVER ARE NOT SEVERABLE where an entire sum is recovered for the conversion of articles for some of which trover will not lie, but the judgment must be reversed.

1. This should be *Van Dyck v. Van Buren*, 1 Cai. 108.

ERROR to the common pleas, to reverse a judgment recovered by the defendant in error in an action of trover brought against the plaintiff in error for the conversion of certain articles appertaining to an ashery. The articles sued for consisted of two potash kettles set in an arch of masonry, with a chimney set upon a platform, but not fastened to the building; two troughs set in the ground with their tops nearly even with the surface; a lot of boards for an upper floor in the building; five leaches, and two small kettles standing in the building and necessary for use, but not set or attached in any way. The defendant in error contracted to convey the premises, upon which the ashery stood, to the plaintiff in error, upon payment of the consideration-money by a certain day. The money was paid at the day, and the plaintiff in error took possession (the articles in question being in the building at the time), and afterwards received a conveyance from the defendant in error by deed of common warranty without any reservation. He then demised the premises and the lessee used the kettles until the building was burned, and afterwards paid for their use. The judge instructed the jury that the plaintiff, now defendant in error, was entitled to recover. Verdict and judgment accordingly; whereupon the defendant sued out this writ.

The record showed that after issue joined in June term, 1825, the cause was continued thus: "And hereupon the proceedings thereof are continued, etc., until the first Monday of October next [the next term]. Therefore, let there come a jury, etc., on the first Monday of December next [term following October term], at which day come the parties, etc., and the jurors," etc., setting forth the verdict.

J. Boughton, for the plaintiff in error.

R. Beach, contra.

By Court, WOODWORTH, J. The first objection is to the form of the record. A continuance is entered from June to October term; and then an award of *venire* to December term then next, at which day came the parties, and the jurors also came. This is sufficiently plain, and must be understood, that the parties and jurors appeared at December term. Although under the statute the continuance might have been awarded from June to December, without any award of *venire*, the present entry is substantially the same, and at most is only a miscontinuance, which is cured by the statute of jeofails: 3 Johns. 183.

The more important question is, whether the potash kettles

being affixed to the freehold, passed with the land. If they did, the court below erred; and the judgment must be reversed, unless the case falls within some of the qualifications or exceptions to the general rule. That rule appears to be well established; whatever is affixed to the freehold becomes part of it, and cannot be removed. Exceptions have been admitted between landlord and tenant; between tenant for life or in tail and the reversioner; yet the rule still holds between heir and executor: Bull. N. P. 34. In *Holmes v. Tremper*, 20 Johns. 30 [11 Am. Dec. 238], Chief Justice Spencer says: "When a farm is sold without any reservation, the same rule would apply as to the right of the vendor to remove fixture, as exists between the heir and executor."

Lord Ellenborough, in the case of *Elwes v. Maw*, 3 East, 38, lays down the law relative to fixtures as arising between three classes of persons: 1. Between heir and executor; 2. Between the executors of tenant for life or in tail and the remainderman or reversioner; 3. Between landlord and tenant; and observes that, "in the first case, the rule obtains with the most rigor in favor of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel anything which has been affixed thereto." In the latter cases, the reasons for relaxing the rule are obvious, upon motives of public policy. The tenant is thereby encouraged to make improvements, and the interest of trade promoted, while the landlord or reversioner has no cause to complain, inasmuch as the farm is restored to him in the same state as when he parted with it. A different rule would effectually check all improvements by the tenant, where it is known that at the end of the term they are to be surrendered to the landlord, or the reversioner of tenant for life. But the case between heir and executor, and vendor and vendee is widely different. The ancestor or vendor has the absolute control, not only of the land, but of the improvements. The heir and executor are both representatives of the ancestor; the vendor has an election to sell or not to sell the inheritance.

If he does elect to sell, he knows that by law the fixtures pass; and there is no good reason why that law should interpose in his behalf and protect him against the loss of improvements which he has deliberately chosen to part with. It is for reasons of this kind, I apprehend, the old rule of law seems still to hold. In 7 Bac. 258, this is expressly recognized. The author observes, that although in an action of trover by an executor

against an heir for a cider-mill, tried at Worcester, before Lord C. B. Comyns, his lordship was of opinion that it was personal estate, and directed the jury to find for the executor; yet Lord Mansfield has observed, that that case, in all probability, turned upon a custom, and that where no circumstances of that kind arise, the rule still holds in favor of the heir, seems fully established by the decision of the court of king's bench, in *Lawton v. Lawton*, Easter, 22 Geo. III. The title of the case referred to seems to be *Lawton v. Salmon*, and is to be found in 1 H. Bl. 259, note a. As reported, I do not find that Lord Mansfield, in giving this opinion of the court, says that the case before Comyns, C. B., turned upon a custom. Yet the whole scope of the opinion is clearly against it. He recognizes the relaxation of the old rule as confined to cases between landlord and tenant, and tenant for life and remainder-man; where for the benefit of trade and as an encouragement to lay out money in improving the estate, there has been a departure from the old rule, which is no injury to the remainder-man, because he takes the estate in the same condition as if the thing in question had never been raised. He adds: "I can not find that between heir and executor there has been any relaxation of this sort, except in the case of the cider-mill, which is not printed at large." It was a *nisi prius* decision, and evidently considered as not controlling the general law.

From this review, it appears to me that the case of vendor and vendee rests on the same ground as that of heir and executor; and that the fixtures in such cases are not considered as personal property. I incline to think the evidence of conversion was sufficient; and that the plaintiff was entitled to recover for some articles not annexed to the freehold; but as damages were recovered for the whole, which can not now be severed, the judgment in the court below must be reversed, and a *venire de novo* awarded by the common pleas of Monroe.

Judgment reversed.

THE FOREGOING DECISION IS CITED as authority upon the point as to what annexation to the realty is necessary to constitute a fixture, in *Raymond v. White*, 7 Cow. 321; *Walker v. Sherman*, 20 Wend. 639; *Buckley v. Buckley*, 11 Barb. 57, *per Hand, J.*; *Ritchmyer v. Morse*, 37 How. Pr. 392, S. C., 5 Abb. Pr. (N. S.) 48; 3 Keyes, 252; and *Fisher v. Saffer*, 1 E. D. Smith, 612; that trade fixtures annexed by a tenant are removable by him: *Mott v. Palmer*, 1 N. Y. 570; and *Ford v. Cobb*, 20 Id. 349; that the general rule prevails between vendor and vendee, mortgagor and mortgagee, and heir and executor, prohibiting the removal of trade fixtures, in *Robinson v. Preswick*, 3 Edw. Ch. 247; *Murdock v. Gifford*, 18 N. Y. 31; and *Sands v.*

Pfeiffer, 10 Cal. 264. As to a tenant's right to remove fixtures, see the note to *Holmes v. Tremper*, 11 Am. Dec. 241. As to what constitutes a fixture, see *Hunt v. Mullanphy*, 14 Am. Dec. 300 and note; see, also, *Kirwan v. Latour*, 2 Am. Dec. 519; *Taylor v. Townsend*, 5 Id. 107; and *Gale v. Ward*, 7 Id. 223.

FOWLER v. ÆTNA FIRE INSURANCE COMPANY.

[6 COWEN, 673.]

EVIDENCE OF GENERAL GOOD CHARACTER IS INADMISSIBLE, by way of defense, in a civil action, in which a party is charged with a specific fraud. IN CIVIL ACTIONS THE CHARACTER of every transaction must be ascertained by its own circumstances, and not by the character of the parties.

WARRANTY IN A MARINE POLICY being in the nature of a condition precedent, must be fulfilled by the insured before he can recover on the contract, whether the thing warranted be material or not, and whether the breach of warranty proceed from fraud, negligence, misinformation, or any other cause.

DESCRIPTION OF A VESSEL is a warranty.

SAME RULE HOLDS IN FIRE INSURANCE, and, therefore, the description of the property in the policy, is a warranty by the insured, and an error therein, whether it arise from design or mistake, is equally fatal to his right of action on the contract.

CONCEALMENT of the true state of the property insured is a fraud, though the insured need not state what the insurer knows.

POLICY DESCRIBING "FRAME HOUSE FILLED IN WITH BRICK" as containing the goods insured is void, if the walls of the house are not filled in with brick.

ASSUMPSIT on a policy of insurance against fire. The policy was on the plaintiff's stock in trade, etc., described as contained in a two-story "frame house filled in with brick," situate, etc. It appeared that the walls were, in fact, hollow, and not filled in with brick. There was a condition attached to the policy to the effect that if any person insuring in the company should describe insured property otherwise than as it really was, so that the same might be insured at a lower rate, such insurance should be void. Evidence was introduced on the question as to whether the plaintiffs had been guilty of fraud in proving an over-valuation of the goods. The judge thereupon allowed the plaintiffs to produce evidence of their good character for integrity, to which the defendants excepted.

The judge considered the description of the house as "filled in with brick" to be a warranty, but received evidence to show that the wrong description was a mistake either of the plaintiffs or of the defendant's agent; and charged the jury that if the plaintiffs made no representation of the character of the property

insured, but the company's agent took it upon himself to describe it, the plaintiffs were not responsible for the error; and that if the plaintiffs made the mis-description, but not fraudulently to get a lower rate of insurance, but through mistake, they were entitled to recover. The defendants excepted to the charge. Verdict for the plaintiffs, and a motion for a new trial.

Talcott, Attorney-general, for the motion.

G. C. Bronson and H. Maxwell, contra.

By Court, SAVAGE, C. J. As to the evidence of character, it was said by this court, *Ruan v. Perry*, 3 Cai. 120, "that in actions of tort, and especially charging a defendant with gross depravity and fraud, upon circumstances merely, evidence of uniform integrity and good character is oftentimes the only testimony which a defendant can oppose to suspicious circumstances." The rule in England is this: "that in a direct prosecution for a crime, such evidence is admissible; but when the prosecution is not directly for the crime, but for the penalty, it is not:" *Attorney-general v. Bowman*, 2 Bos. & P. 532, note (a). That was an information against the defendant for keeping false weights, and for attempting to corrupt an officer. Eyre, C. B., said: "I can not admit this evidence in a civil suit." If such evidence is admissible, here, it will be proper in every case where unfair practices are alleged. A specific fraud is charged, that must be met upon its own merits unless supported only by circumstances; as in the case of *Ruan v. Perry*, where a naval officer was charged with gross fraud and collusion with a foreign officer, upon slight circumstances.

If such evidence is proper then a person may screen himself from the punishment due to fraudulent conduct till his character becomes bad. Such a rule of evidence would be extremely dangerous. Every man must be answerable for every improper act; and the character of every transaction must be ascertained by its own circumstances, and not by the character of the parties. I think it is very immaterial as regards this action, whether the error in description arose from design or mistake. The question is, did this description amount to a warranty that the property answered the description. The judge at the circuit so considered it, and it was admitted on the argument, that if the principles of marine insurance are applicable to fire insurance, it is a warranty. In the case of *Stetson v. Mass. Mutual Fire Ins. Co.*, 4 Mass. 337 [3 Am. Dec. 217], Sewall, J., lays down the law thus: "The estimate of the risk undertaken by

an insurer must generally depend upon the description of it made by the insured or his agent. A mistake or omission in his representation of the risk, whether willful or accidental, if material to the risk insured, avoids the contract." For this, he cites 1 Marsh. on Ins. 335, 339. That writer states that a warranty being in the nature of a condition precedent, must be fulfilled by the insured, before performance can be enforced against the insurer, and whether the thing warranted was material or not, whether the breach of it proceeded from fraud, negligence, misinformation, or any other cause, the consequence is the same: 1 Marsh. 347.

In relation to the sale of personal property, it is held that a bill of parcels is not a warranty that the goods are what they are represented to be: 2 Cai. 48, and other cases down to the 20 Johns. 198. But in relation to policies of insurance it is held that a description of a vessel is a warranty. For instance, the description of a vessel as Swedish, is a warranty of her national character: Phil. on Ins. 125, and the cases there cited; 8 Johns. 237, 319. Several cases in 2 H. Bl. 574, etc., show that the conditions attached to the policy are to be considered part of the instrument. No cases have been produced to show that a description of property insured by a policy against fire is to be construed differently from a description in a marine policy. I can perceive no reason why there should be a difference. "Insurance," says Lord Mansfield, "is a contract upon speculation:" 3 Burr. 1909. "The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation," etc. He says the insured need not state what the insurer knows, but the keeping back the true state of the property is a fraud.

In this case the plaintiffs ought to have known the true state and condition of their house, and have truly represented it. Not having done so, they fail in their action. The property burned is not the property insured. This is not a case in which equities should be considered. It is a sort of gambling speculation upon chances, and the parties must be held strictly and literally to their contract.

I think the judge misdirected the jury, and that a new trial should be granted.

New trial granted.

MISDESCRIPTION OF INSURED PROPERTY.—The effect of an error in the description of insured property, upon the validity of the contract, depends

very largely upon the question as to whether such description is to be regarded as a representation merely, or as a warranty. If the error is material to the risk, that is to say, if the difference between the character and situation of the property as it is in fact, and that which the description assigns to it, is such that the insurer might have refused to enter into the contract, or might have exacted a greater premium if the property had been truly described, the effect of the error is substantially the same whether the description be considered as a representation or as a warranty; but it is not so where the error is not thus material to the risk.

DISTINCTION BETWEEN REPRESENTATIONS AND WARRANTIES.—There is a clear and well settled distinction in the law of insurance, between representations and warranties. A representation is not a part of the contract, but is collateral to it: *Snyder v. Farmers' Ins. and Loan Co.*, 13 Wend. 92. It is a statement of a past or present fact relating to the risk: *Alston v. Mechanics' Mut. Ins. Co.*, 4 Hill, 329; and is made by the assured as an inducement to the insurer to enter into the contract. In order that it may avoid the contract it must operate as a fraud on the insurer: *Id.* 334. Hence, even though it be erroneous, unless it was fraudulently intended, or unless it materially affects the risk or the rate of insurance to the injury of the insurer, it will not avoid the contract: *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72; *Continental Ins. Co. v. Kasey*, 25 Gratt. 268; S. C., 18 Am. Rep. 681. But if it is thus materially erroneous it avoids the policy; as where it is falsely stated that no lamp is used in the picking room of a factory: *Clark v. Manufacturers' Ins. Co.*, 8 How. U. S. 248, citing the principal case. So, where there is an inadvertent omission to state facts material to the risk: *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125; *Fland. on Fire Ins.* 224.

A warranty, on the other hand, is a part of the contract: *Snyder v. Farmers' Ins. and Loan Co.*, 13 Wend. 92; *Fland. on Fire Ins.* 226. It is in the nature of a condition precedent: *Fowler v. Ætna Fire Ins. Co.*, 7 Wend. 270; *Inman v. Western Fire Ins. Co.*, 12 Id. 460. And must be strictly fulfilled in order to enable the assured to recover on the policy: *Fland. on Fire Ins.* 226. If it be false in any particular, whether the error materially affects the risk or not, the contract is broken, and in case of a loss, the assured can not recover: *Duncan v. Sun Fire Ins. Co.*, 6 Wend. 488; *Inman v. Western Fire Ins. Co.*, 12 Id. 460; *Jennings v. Chenango Co. Mut. Ins. Co.*, 2 Denio, 75; *Burritt v. Saratoga Fire Ins. Co.*, 5 Hill, 193; *Kennedy v. St. Lawrence Co. Mut. Ins. Co.*, 10 Barb. 286; *Wall v. Howard Ins. Co.*, 14 Id. 385; *Nicoll v. American Ins. Co.*, 3 Wood. & M. 529; *Mutual etc. Ins. Co. v. Miller*, 39 Ind. 475; *Witherell v. Maine Ins. Co.*, 49 Me. 200; *Continental Ins. Co. v. Kasey*, 25 Gratt. 268; S. C., 18 Am. Rep. 681; *Billings v. Tolland etc. Ins. Co.*, 20 Conn. 139; *Washington Mutual Ins. Co. v. Merchants' etc. Ins. Co.*, 5 Ohio St. 450; *Fland. on Fire Ins.*, 226. Says Sutherland, J., in *Inman v. Western Fire Ins. Co.*, 12 Wend. 460: "It is well settled that where there is a condition precedent or a warranty in a policy of insurance, it is of no consequence whether the thing warranted, or to be performed, is material to the risk or not, if not performed. The defendant has a right to say *non in hæc fœdera veni*: *Fowler v. Ætna Fire Ins. Co.*, 6 Cow. 673; *Duncan v. Sun Fire Ins. Co.*, 6 Wend. 488; 7 Cow. 649; *Cornell v. Le Roy*, 9 Wend. 163, and the authorities in those cases; 19 Johns. 72; 6 Cow. 624."

Perhaps it is a more accurate statement of the principle that the warranty itself makes the thing warranted material. It becomes thereby material to the contract, though it do not materially affect the risk. *Bronson, J., de-*

delivering the opinion of the court in *Burritt v. Saratoga Co. Mut. Fire Ins. Co.*, 5 Hill, 193, thus states the doctrine: "A warranty by the assured in relation to the existence of a particular fact, must be strictly true, or the policy will not take effect; and this is so, whether the thing warranted be material to the risk or not. It would perhaps be more proper to say that the parties have agreed on the materiality of the thing warranted, and that the agreement precludes all inquiry on the subject."

WARRANTY MUST BE INSERTED IN POLICY.—The material difference between a warranty and a representation, it will be observed, is that the former is a part of the contract, while the latter is not. Hence, a representation becomes a warranty when inserted in the contract: *Fland. on Fire Ins.*, 233; *Williams v. N. E. Mut. Fire Ins. Co.*, 31 Me. 219; *Ripley v. Ætna Ins. Co.*, 30 N. Y. 136. The contrary seems to have been held, however, in *Schultz v. Merchants' Ins. Co.*, 57 Mo. 337. In that case Napton, J., delivering the opinion of the court, said: "A representation of a particular fact made in the application for a policy, and inserted in the policy, is only important in the event that its falsity affects the risk. The modern doctrine is that where facts are stated merely by way of recital or description, and are not material to the risk, the clause is not a condition or warranty." The alleged false statement there was that the insured building was "tenanted," but it was held that, in order to avoid the policy, it must appear that this error was material to the risk. At all events, it is imperatively necessary that a stipulation or representation relied upon as a warranty should either be written in the policy, or expressly made a part of it; for the policy is the only legal evidence of what the contract is: *Dow v. Whetton*, 8 Wend. 166; *Jennings v. Chenango Co. Mut. Ins. Co.*, 2 Denio, 78. This principle is very satisfactorily stated in the opinion of Oakley, J., in *Delonguemare v. Tradesman's Ins. Co.*, 2 Hall, 589, where he says: "Assuming that the same rules of construction are to be applied to fire as to marine policies, in determining what shall constitute a warranty, and what shall be a representation merely, the general principle seems to be well settled that an express warranty must appear on the face of the policy, and that any instructions for insurance, unless inserted in the instrument itself, do not amount to a warranty: 1 Cond. Marsh. 349, 451; *Pawson v. Watson*, Cowp. 785; 2 Cai. 142; 3 Kent Com. 235." To the same effect are: *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72; *Snyder v. Farmers' Mut. Ins. and Loan Co.*, 13 Id. 92. A warranty will not be created by construction. Says Sutherland, J., in *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72:

"The doctrine of warranty in the law of insurance is one of great rigor, and frequently operates very harshly upon the assured. A warranty is considered as a condition precedent, and whether material or immaterial, as it regards the risk, must be complied with before the assured can sustain an action against the underwriters. A warranty, therefore, is never created by construction. It must either appear in express terms, affirmative or promissory, or must necessarily result from the nature of the contract: 1 Marsh. 347 to 350; *Phil. on Ins.* 112, 124. It must, therefore, appear on the face of the policy, in order that there may be unequivocal evidence of a stipulation, the non-compliance with which is to have the effect of avoiding the contract. It was once doubted whether it must not be incorporated into the body of the policy, and it was contended that it was not sufficient for it to be written in the margin; but if it appears on the face of the policy that is sufficient: 1 Doug. 11; 1 T. R. 343. But written instructions exhibited by the brokers to some of the underwriters, for the purpose of effecting insurance, unless inserted in the policy, do not amount to a warranty."

APPLICATION AS PART OF POLICY.—The application, survey of the premises, proposal for insurance, etc., are preliminary to the contract, and form no part of it, unless expressly made so. Hence, representations made therein, as to the character, condition and situation of the property to be insured, are not warranties, and any errors in such representations, which are not, in fact, fraudulently intended, or do not materially affect the risk, will not invalidate the contract; but if the policy itself expressly makes the application, survey, etc., a part of the contract, the statements and descriptions contained therein will be construed as if written on the face of the policy, and will become warranties: *Le Roy v. Market Fire Ins. Co.*, 39 N. Y. 90; *Fland. on Fire Ins.*, 233, and cases cited. But a mere reference to the application or survey will not, it seems, make it a part of the policy: *Delonguemare v. Tradesman's Ins. Co.*, 2 Hall, 589; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72; *Snyder v. Farmers' Ins. and Loan Co.*, 13 Id. 92. If, however, the application or other extraneous document is referred to as forming part of the policy, it will be so construed: *Murdock v. Chenango Co. Mut. Ins. Co.*, 2 N. Y. 210. In other words, it must clearly appear that the parties intended the application to form part of the policy: *Mutual etc. Ins. Co. v. Robertson*, 59 Ill. 123; *Kentucky etc. Ins. Co. v. Southard*, 8 B. Mon. 634. It was held, however, in *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, that statements made in an application which is expressly declared to be a part of the policy, are not warranties if they relate to matters not called for by the conditions of the policy, and do not vitiate it, unless they are materially and substantially untrue.

WARRANTIES MODIFIED BY APPLICATION.—Although when the application is expressly made a part of the policy, the description and other statements therein contained become warranties, their effect may be modified by other parts of the application, or of the policy, or conditions of insurance, so that they will be binding only so far as they are material to the risk. Thus, in *Garcelon v. Hampden Fire Ins. Co.*, 50 Me. 580, the application was made a part of the policy and warranty. The applicant, after describing the property, etc., concluded his application by covenanting and agreeing "to and with the said company that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk." It was held in an action on the policy that the statements made in the application were warranties only so far as they were material to the risk and were within the knowledge of the assured; and, therefore, the policy was not avoided by an erroneous statement that the building insured was "well ventilated," it not appearing that the risk was affected thereby, or that the falsity of the statement was known to the assured. The same effect was given to a similar clause in the application in *Houghton v. Manufacturers' Mut. Fire Ins. Co.*, 8 Met. 114, and in *Elliott v. Hamilton Mut. Ins. Co.*, 13 Gray, 139. So, in *Hall v. People's Mut. Fire Ins. Co.*, 6 Gray, 185, and *Prieger v. Exchange Mut. Ins. Co.*, 6 Wis. 89. So, it was held in *Ætna Life Ins. Co. v. France*, 94 U. S. 561, that although the declarations and answers in the proposal for insurance were expressly made conditions of the validity of the policy, yet because the applicant stated in conclusion that the answers were correct as far as he could remember, it was necessary, in order to defeat a recovery on the policy, to show not only that the answers were false, but that the applicant knew them to be false. But where the application made part of the policy, contained a clause to the effect that "the misrepresentation or suppression of facts" should destroy the applicant's claims

under the policy, and then concluded as follows: "The foregoing is a just, full and true exposition of all the facts and circumstances in regard to the situation, etc., of the property insured so far as the same are known to the applicant, or are material, and of all the facts inquired for;" and in the answer to an inquiry as to the location of all buildings within one hundred feet, the applicant omitted to mention several buildings within that distance, it was held that the omission was fatal, though not material to the risk, because this was one of the "facts inquired for:" *Hardy v. Union Mut. Fire Ins. Co.*, 4 Allen, 217.

AGENT'S KNOWLEDGE OF THE FACTS.—Statements made in a policy, or in the application, if made part of it, with reference to the character, condition, and situation of the property, will not, it seems, be regarded as strict warranties, where the agent of the insurers, in effecting the insurance, proceeds upon his own knowledge of the premises. Thus it was held in *Cumberland Valley Mutual Protection Soc. v. Schell*, 29 Pa. St. 31, that the assured was not bound to the strict accuracy of a description filled up by an agent of the insurers from his own acquaintance with the facts. So in *Gerhauser v. North British and Mer. Ins. Co.*, 7 Nev. 174, where the building insured was described as "a brick building," but one of the walls having settled had previously been replaced by wood, and that fact was known to the agent. So in *Roth v. City Ins. Co.*, 6 McLean, 324, where the survey and representation of the property were made by an agent of the insurers, who was as well acquainted with the premises as the assured was. So in *Continental Ins. Co. v. Kasey*, 25 Gratt. 268, 18 Am. Rep. 681, where the insurers sent an agent to examine the premises, and the building was described in the policy as a frame building, whereas part of it was made of logs, weather-boarded and plastered; but that fact was not known either to the agent or to the assured. So it was held in *Plumb v. Cattaraugus etc. Ins. Co.*, 18 N. Y. 392; *Rowley v. Empire Ins. Co.*, 36 Id. 550, and *Maher v. Hibernia Ins. Co.*, 6 Hun, 353, that where the description was drawn up by the agent of the insurers they were responsible for misstatements made therein. But if the application stipulates that the insurer is not to be bound by representations made to the agent, but not contained in such application, the agent's knowledge of the premises is immaterial: *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52.

And where a description of the property constitutes a warranty, such warranty will be waived by the insurers if they continue to take the benefit of the contract after ascertaining that the description is false. Thus where it was falsely stated in the application which was made a part of the policy, that there were no other buildings within ten rods, and the insurers, with full knowledge that the statement was false, levied and collected assessments on the premium note, they were held estopped from setting up the warranty to defeat a recovery by the assured upon the policy: *Frost v. Saratoga Mut. Ins. Co.*, 5 Denio, 154.

QUALIFICATION OF RULE AS TO STATEMENTS IN POLICY.—While it is true, as above stated, that, as a general rule, representations inserted in a policy, or expressly made a part of it, relating to the condition and situation of the property, are regarded as warranties and must be fulfilled in every particular, whether material to the risk or not, or the policy will be void; there seems, nevertheless, to be an important qualification of this rule deducible from some of the later authorities. A distinction is to be observed between those descriptive particulars, which are inserted in the contract merely for the purpose of identifying the property insured, and those which are designed to indicate the nature, extent and incidents of the risk. These two classes of

statements are to be construed with reference to the purpose for which they are respectively made. Those descriptive particulars which serve simply to point out or to identify the property, are to be taken together; if any of them are erroneous, the policy will, nevertheless, be good, if enough is left to show what property was intended. On the other hand, those statements which are not designed to identify the property, but to describe the risk, must be true in every particular, whether actually material to the risk or not. "Any statement or description on the face of the policy *which relates to the risk* is a warranty:" *Wood v. Fire Ins. Co.*, 13 Conn. 544, per Sherman, J.; *Wall v. East River Mut. Ins. Co.*, 7 N. Y. 372.

This is perhaps the distinction intended to be drawn by Napton, J., in *Schultz v. Merchants' Ins. Co.*, 57 Mo. 337, in the language quoted *supra*, although he says, indeed, that a statement which is not material to the risk can not be a warranty which seems to be contrary to the weight of authority. Probably, however, in most cases, it will be found that a statement which is descriptive of the risk is, or at least may be, material to the risk.

To illustrate the distinction here attempted to be pointed out a reference to cases will be useful. In *Heath v. Franklin Ins. Co.*, 1 Cush. 257, the building insured was described as a brick building with a "composition roof, occupied by several tenants, and connected by doors with the adjoining building, situate at the corner of Charles street and the Western avenue in Boston. A cabinet-maker's shop is in the building." The whole description, with the exception of the statement contained in the last sentence, applied to a building on the corner of Charles street and Western avenue. The cabinet-maker's shop was however in the adjoining building, to which also some other parts of the description applied. It was held, however, that there was enough in the description to show that the former building was the one intended by rejecting the statement as to the cabinet-maker's shop as erroneous, and it was accordingly ruled that the policy applied to that building. Again, in *Yonkers etc. Fire Ins. Co. v. Hoffman Fire Ins. Co.*, 6 Rob. (N. Y.) 316, a building was described as being between Meade and Arch streets, whereas in fact it was between Meade and Ash streets; but the error was held immaterial, because the building was sufficiently identified by other parts of the description. So in *American Central Ins. Co. v. McLanathan*, 11 Kan. 533, the building insured was described in the policy as the applicant's "two-story frame dwelling, occupied by him, situate south-west corner second and Vine streets, Leavenworth, Kansas," with a "frame barn in rear of same," whereas the applicant's dwelling was in fact on the south-west corner of Second and Elm streets; but the description being regarded as sufficient in other particulars, the error was rejected as immaterial. In that case, however, the mistake was made by the agent of the insurers who knew what property was intended. But in *Alexander v. Germania Fire Ins. Co.*, 66 N. Y. 464, the building upon which the insurance was effected was described as a "two-story and extension frame shingle-roof building, occupied as a dwelling, situate," etc., and it was held that the statement that it was "occupied as a dwelling," not being necessary to identify the property, could not be rejected if erroneous, but must be regarded as a strict warranty, which if false would avoid the policy. In other words, that clause in the description was construed not as relating to the identity of the property, but as indicating the nature of the risk.

REASONABLE CONSTRUCTION OF DESCRIPTION.—A further principle in relation to this subject, which is of frequent application, is that descriptions of the property insured, even though regarded as warranties, must receive a

reasonable construction. In determining whether they have been broken or not, the assured is not to be bound by a strained interpretation of them. Thus in *Dobson v. Sotheby*, Mood. & Malk. 90, the insured property consisted of certain agricultural buildings, which were described as a "barn." Lord Tenterden, C. J., admitted that this was not a strictly accurate designation, but held, nevertheless, that it was not such a misdescription as would avoid the policy, because it gave the company "substantial information" of the nature of the property. So in *Niblo v. North American Fire Ins. Co.*, 1 Sandf. 555, it was held that the assured was not to be regarded as warranting that he was absolute owner of the buildings insured by a reference to them in the description as "his buildings;" but that if he was merely a tenant of them from year to year, it was a sufficient compliance with the description. Again, in *Friedlander v. London Assurance Co.*, 1 Mood. & Rob. 171, it was one of the conditions of the contract that the place in which the insured goods were deposited should be accurately described. The description was that they were in the plaintiff's "dwelling-house," and the policy was held good, although the plaintiff did not in fact own the house, but lived in one room as a lodger, the goods being kept in that room. In *Carter v. Humboldt Fire Ins. Co.*, 17 Iowa, 456, a part of the description of the building insured was that it was "occupied as stores on the first floor," and it was held a sufficient compliance if one of the rooms on the first floor was so occupied.

In *Mead v. N. W. Ins. Co.*, 7 N. Y. 530, the term "brick dwellings," used in describing the insured property, was held satisfied, although part of the side walls consisted of wooden joists filled in with brick. So in *Medina v. Builders' Mut. Fire Ins. Co.*, 120 Mass. 225, the place of deposit of the insured goods was described in the policy as a "three-story granite building," whereas the front only was granite, and, although the building was three stories high in front and rear, it was only one story high in the middle; but the description was held good. So in *Benedict v. Ocean Ins. Co.*, 31 N. Y. 389, the description called for a "five-story brick building," and it was held to be answered by a brick building consisting of five stories above the cellar, it appearing that it was not customary to speak of the cellar as an additional story. And in *Fowler v. Ætina Fire Ins. Co.*, 7 Wend. 270, where the principal case came again before the court after a second verdict in favor of the plaintiff, it was held that it was admissible to show a usage between insurers and insured, to describe a house filled in with brick in front and rear and supported on one side by the wall of an adjoining house filled in with brick, and on the other by a brick wall, as a "frame house filled in with brick." In *Warren v. Davenport Fire Ins. Co.*, 31 Iowa, 464, the insured property was described in the policy as "private stock contained in a one-story saw-mill," and it was held that this was a sufficient description of the stock held by the assured in a corporation which owned the mill in question. So in *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, it was held that goods entrusted to warehousemen for keeping were sufficiently described by the terms "merchandise held in trust" by them, in a policy of insurance. See, also, *Williams v. N. E. Mut. Ins. Co.*, 31 Me. 219; *Scott v. Quebec Fire Ass. Co.*, Stuart, 147, and *N. Y. Belting etc. Co. v. Washington Fire Ins. Co.*, 10 Bosw. 428, for further illustrations of the position that warranties in policies of insurance are to be reasonably construed.

ERRORS AS TO NATURE OR CONDITION OF PROPERTY.—Of course if there is an entire misdescription of the property, as to its essential character, it is

fatal to the policy. Thus, in *Goddard v. Monitor Ins. Co.*, 108 Mass. 56, the property was described as a "machine shop," when it was in fact an "organ factory," and the variance was held fatal, not only because the description was wholly inapplicable to the property, but because, also, the hazard was greater in the case of an organ factory than in that of a machine shop. So in *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52, reversing S. C., 22 Barb. 537, where there was a policy on a "stone dwelling-house," and after a loss it appeared that there was a wooden kitchen attached to the building, and it was held that the kitchen being an essential part of the dwelling-house, the building was, therefore, partly a wooden structure, and it was a radical and fatal error to describe it as a stone building, and that as the error was material to the risk, the effect would be the same whether the description were regarded as a mere representation or as a warranty. But where a building was described as brick when it was partly of wood, and the applicant stated at the time of taking out the policy that he was not certain of the correctness of the description, it was held that there was no breach of warranty: *Woods v. Atlantic Mut. Ins. Co.*, 50 Me. 112.

ERRORS AS TO SITUATION AND SURROUNDINGS.—An entire misdescription of the place of deposit of personal property which is the subject of insurance, will avoid the policy, for the place where the property is kept is an essential feature of the risk. Therefore, where goods insured were described as being in a certain section in a store, designated as "Letter C," when in fact they were in another section, both at the time of the insurance and when the loss occurred, it was decided that there was a breach of warranty, and that the assured could not recover: *Bryce v. Lorillard Fire Ins. Co.*, 55 N. Y. 240: S. C., 3 Jones & S. 394; 46 How. Pr. 498. And it seems that in such cases, in order to fulfill the warranty, the goods must be in the designated place at the time of the loss. Hence, where goods were insured in the "store part" of a building, and at the time of the loss were in another part of the same building which was not occupied as a store, it was held that there could be no recovery: *Boynton v. Clinton, etc., Mut. Ins. Co.*, 16 Barb. 254. So, where there was a policy of insurance on cars "contained in car house marked No. 1," and some of the cars were destroyed by fire while out on the line of the road, it was held fatal to the action: *Annapolis, etc. R. R. Co. v. Baltimore Fire Ins. Co.*, 32 Md. 37. So, where there was an insurance on a phaeton "contained in a frame barn," it was held to constitute a warranty that it should be kept in the barn, except when temporarily absent for use: *McCluer v. Girard etc. Ins. Co.*, 43 Iowa, 349.

OMISSION TO MENTION BUILDINGS situated near the insured property, in answer to proper interrogatories, will generally avoid the policy. Thus, in *Chaffee v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. 376, in the application, which was made a part of the policy, the applicant, in answer to a question as to the situation of the property with reference to other buildings within ten rods, gave the distances to several buildings, and the conclusion of the application was: "All of the exposures within ten rods are mentioned;" and this was held a warranty so that if there were any other buildings within ten rods, the policy was void. So, in *Brown v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. 385; *Jennings v. Chenango etc. Co.*, 2 Denio, 75; and *Day v. Conway Ins. Co.*, 52 Me. 60. So, also, in *Burritt v. Saratoga Co. Mut. Fire Ins. Co.*, 5 Hill, 193, where there was a failure to state, in answer to a similar question, that there was a certain cabinet shop within ten rods, although the omission was innocently made, and it did not appear whether it was material to the risk or not. A similar ruling was made in *Kennedy v. St. Lawrence Co.*

Mut. Ins. Co., 10 Barb. 290, although the plaintiff offered to show that the application was written out by an agent of the company who was on the premises at the time, and in full view of all the surrounding buildings. In *Gates v. Madison Co. Mut. Ins. Co.*, 2 N. Y. 43, however, the applicant, in answer to a similar question, mentioned certain buildings as the "nearest" buildings, but omitted to speak of others within the prescribed distance, and although the application was a part of the policy, it was held, reversing S. C., 3 Barb. 73, that there was no warranty that there were no other buildings within ten rods, and that the policy was not void, unless the omission was material to the risk, which must be left to the jury to decide. The same case came again before the court in *Gates v. Madison Co. Mut. Ins. Co.*, 5 N. Y. 469, and the former decision was adhered to by the majority of the court. So, in *Masters v. Madison Co. Mut. Ins. Co.*, 11 Barb. 624, where the applicant mentioned certain buildings as the "nearest" buildings, without professing to do more. And in *Dennison v. Thomaston Mut. Ins. Co.*, 20 Me. 125, it was held that in answer to the question, "What distance from other buildings?" the applicant was bound only to mention the distance and situation of buildings which a man of ordinary capacity would judge likely to be dangerous in case of fire; although the fire from which the loss arose was actually communicated from one of the buildings not mentioned.

ERRONEOUS STATEMENT OF USE, ETC.—In *Wood v. Fire Ins. Co.*, 13 Conn. 544, a part of the description was that the building insured was a paper-mill, and this was held to relate to the risk, and to be a warranty that the property was in fact a paper-mill. So, in *Wall v. East River Mut. Ins. Co.*, 7 N. Y. 372, where it was stated that the building was "occupied as a store-house," whereas a part of it was used for hackling hemp and spinning it into rope-yarns. So, where a building described as a "dwelling-house," was used partly for a billiard saloon and partly for a restaurant: *Sarsfield v. Metropolitan Ins. Co.*, 61 Barb. 679; see, also, *Jennings v. Chenango Co. Mut. Ins. Co.*, 2 Denio, 75. But it seems that a warranty as to the use or occupation of the premises will not be held to extend to the future, unless there is something to indicate that such was the intention of the parties: *Catlin v. Springfield Fire Ins. Co.*, 1 Sumn. 434; *O'Neil v. Buffalo Fire Ins. Co.*, 3 N. Y. 122; *Smith v. Mechanics' etc. Ins. Co.*, 32 Id. 399; S. C., 29 How. Pr. 384; *Stout v. City Fire Ins. Co.*, 12 Iowa, 371; *U. S. Fire and Marine Ins. Co. v. Kimberly*, 34 Md. 224. So, of other statements in the description; as where it was said in the policy, "clerk sleeps in the store:" *Frisbie v. Fayette Mut. Ins. Co.*, 27 Pa. St. 325. So, where the application stated: "No fire in or about said building, except one under kettle securely imbedded in masonry," etc.: *Schmidt v. Peoria M. and F. Ins. Co.*, 41 Ill. 295. To the same effect, see *Aurora Fire Ins. Co. v. Eddy*, 55 Id. 213; see, also, *Stebbins v. Globe Ins. Co.*, 2 Hall, 631. On the other hand, it was held in *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19, that the statement: "There is a watchman nights," was a warranty, not only *in presenti*, but for the future also.

THAT DESCRIPTIONS IN FIRE AND MARINE POLICIES are to be construed according to the same rules, as laid down in the principal case, is a doctrine fully affirmed in *Wall v. East River etc. Ins. Co.*, 7 N. Y. 373, although a contrary view seems to have been taken by the court in *Jolly v. Baltimore Equitable Soc.*, 1 Harr. & G. 295. That case, however, did not directly involve the question, as the controversy there was as to the right of the assured to repair the premises. It was said, generally, in *Burritt v. Saratoga Co. Mut. Fire Ins. Co.*, 5 Hill, 188, that the doctrine as to misrepresentations in fire insurance was less stringent than in cases of marine insurance. So as to the

effect of a concealment, in *Protection Ins. Co. v. Harmer*, 2 Ohio St. 452. As to misdescriptions in marine policies, see *Barker v. Phoenix Ins. Co.*, 5 Am. Dec. 339; *Lewis v. Thatcher*, 15 Mass. 431; *Atherton v. Brown*, 14 Id. 152; *Goetz v. Low*, 1 Johns. Ch. 341; *Murray v. U. S. Ins. Co.*, 2 Id. 168; *De Hahn v. Hartley*, 1 T. R. 343; *Clapham v. Cologan*, 3 Camp. 381; *Ionides v. Pacific Fire and Marine Ins. Co.*, 6 L. R. Q. B. 674.

THE PRINCIPAL CASE IS FREQUENTLY CITED in the New York courts on this subject. It is also referred to on the question of the admissibility of evidence of character in civil cases, in *Gough v. St. John*, 16 Wend. 653; *Houghtaling v. Kelderhouse*, 2 Barb. 151, and *Shipman v. Burrows*, 1 Hall, 418.

GRAVES v. MERRY.

[6 COWEN, 701.]

NOTICE OF DISSOLUTION of a partnership in the newspapers is sufficient as to all persons who have had no previous dealings with the firm.

ACTUAL NOTICE of such dissolution is necessary as to all with whom the firm has previously dealt.

NOTE MADE AFTER DISSOLUTION by one of the partners, in the firm name, to payees, who have had previous dealings with the partnership, and have no actual notice of the dissolution is binding on all the partners.

INDORSEES HAVING ACTUAL NOTICE of the dissolution may recover on such note against all the partners if it was valid in the hands of the payees, for want of such notice.

PARTNER'S AUTHORITY AFTER DISSOLUTION to sign the firm name to notes for partnership debts may be implied from circumstances.

EXPRESS ADMISSION BY THE OTHER PARTNERS that the firm is bound, or a failure on their part to object to such a note as being made without authority, when it is brought to their notice, will warrant a presumption that it was executed with their knowledge and consent.

ASSUMPSIT on a promissory note, made by the defendants to the plaintiffs. The defendants gave notice of a set-off of a note against the plaintiffs, as partners, indorsed to the defendants by Johnson & Sons, the payees, without recourse, the facts concerning which are stated in the opinion. It appeared that the partnership between the plaintiffs, Graves, Griffin and Hickox, was dissolved by mutual consent on April 1, 1823, before the execution of the note; that notice of the dissolution was published in the Utica Gazette, and was posted up in several places in the neighborhood of the plaintiffs' residence, and that the plaintiffs did no business afterwards as partners. It further appeared that the defendants had knowledge of the dissolution before the note was executed, but it did not appear that Johnson & Sons, the payees therein, had actual notice of such dissolution. It was proved that in October, 1824, the note was

shown to Hickox, who said it was an honest debt against the firm, but they could not avow it, as they could not then pay their old debts, and that the defendants should not have bought it. Graves, another of the plaintiffs, said afterwards, that the plaintiffs intended to sue the defendants so quickly that they could not set off said note. It appeared that in October and November, 1823, Graves had signed the name of Graves, Griffin and Hickox to sundry other notes. Verdict for the plaintiffs, subject to the opinion of the court upon the admissibility of the set-off.

C. P. Kirkland, for the plaintiffs.

H. R. Storrs, *contra*.

By Court, WOODWORTH, J. The question to be decided is whether the note signed by Joel Griffin in the copartnership name to Johnson & Sons was obligatory on all the plaintiffs. In the notice of set-off it is stated that the defendants would, on the trial, give in evidence that on the third of December, 1823, certain persons under the name of John Johnson & Sons were partners in the city of New York, and that the plaintiffs on that day at New York made a promissory note, the handwriting of one of them being thereto subscribed, and thereby promised to pay John Johnson & Sons, or order, one day after date, four hundred and seventy-two dollars and sixty-five cents, with interest, which was indorsed to the defendants on the eleventh of October, 1824. At the trial, a note of this description was given in evidence without objection. The case states that the defendants proved that the signature of the note was in the handwriting of Joel Griffin, and that it was indorsed to the defendants by the payees. From this statement I infer that the payees composed a firm in the city of New York.

If the note was valid against all the plaintiffs, when in the hands of Johnson & Sons, the defendants are entitled to the benefit, for they acquired the right of the payees. Whether the defendants had knowledge or not of the dissolution, at and before the giving of the note, is perfectly immaterial. The contract in favor of Johnson & Sons was negotiable. Whether prosecuted in their names, or that of an indorsee, does not affect the question of liability. A further inquiry is, was the note of December 3, 1823, given for a debt contracted at the time or previous to the dissolution of the partnership? This is a material fact. There is nothing expressly stated in the case on this point. If the cause had been submitted to the jury, one question would

have been, whether the evidence warranted the inference that the note was given for a debt contracted during the existence of the partnership? On the finding of this fact would in part depend the question whether the notice of dissolution was published in such a manner as to affect Johnson & Sons with notice. As the verdict is subject to the opinion of the court, we may draw the same conclusion from the facts proved that the jury might have done.

I incline to think that during the acknowledged existence of the partnership the plaintiffs became debtors to Johnson & Sons. I infer this from the fact proven that the plaintiffs did no business of any kind as partners after their dissolution in April, 1823; that Hickox admitted it as a joint debt against the firm, and spoke of it as an old debt; and the remarks of Graves, who does not seem to question their being indebted, but rather that the defendants could not avail themselves of a set-off. I should certainly understand the witness, who said the plaintiffs did no business as partners after the dissolution, as affirming that no new copartnership debt was contracted. As, then, it is evident from all the testimony that the plaintiffs were debtors at some time to Johnson & Sons, it is necessarily referred to a period prior to the dissolution in April, 1823. If, then, the facts are established that the payees of the note were merchants residing in New York, that the plaintiffs while partners became indebted to them, and afterwards one of the firm gave a note for the debt in the copartnership name, the question of law arises whether Johnson & Sons had notice of the dissolution when the note was executed. No other notice as to the payees is pretended, except the publication in Utica.

The rule seems to be that notice in the newspapers, of the dissolution of a partnership is sufficient notice to all persons who have had no previous dealing with the firm. The doctrine was recognized as reasonable and just, in *Lansing v. Gaine & Ten Eyck*, 2 Johns, 304 [3 Am. Dec. 422]. It has received repeated sanction in the English courts. The case of *Graham v. Hope*, Peak. N. P. Cas. 254,¹ is directly in point. The defendants had been in partnership when the plaintiffs sold them goods. Afterwards the partnership was dissolved; and notice given in the London Gazette; and after this notice the plaintiffs sold and delivered the goods for which the action was brought. Lord Kenyon held that the Gazette was not of itself sufficient notice to the plaintiffs. He laid it down as a general rule, that it was incumbent on persons

1. This should be *Graham v. Hope*, Peak N. P. 154.

dissolving a partnership to send notice of such dissolution to all the persons with whom they had dealings in partnership. In *Ketchum v. Clark*, 6 Johns. 144 [5 Am. Dec. 197], this question was considered. Mr. Justice Van Ness, in giving the opinion of the court, observed that it had not been settled by any decision in this court, when a partnership is to be dissolved, so as not to bind the copartnership by a new contract. He thought we ought at least to go so far as to say, that public notice must be given in a newspaper of the city or county where the partnership business was carried on; that public notice in some reasonable manner must be given; and that would conclude all persons who have had no previous dealings with the firm; but as to persons in the habit of dealing with the firm, public notice was not sufficient by the English law. The necessity and justice of these rules in that case, received the sanction of this court. It follows that Johnson & Sons, having dealt with the plaintiffs previous to the notice of the dissolution, can not be affected by it. Although the giving of the note was a new contract; yet until notice of dissolution was given to Johnson & Sons, such partner was competent to bind the firm, to all persons not chargeable with notice of such dissolution.

Independent, however, of this ground, I think it may be inferred that Joel Griffin acted with the knowledge and assent of the former partners. It is not necessary to prove assent expressly. It may be inferred from circumstances. Perhaps a jury, had this question been submitted to them, might have considered the evidence not satisfactory. I can not say that had they found a verdict either way, I should be disposed to set it aside. That, however, is a question not before us; we are called on to decide this fact. Upon mature deliberation, I am satisfied that neither Hickox nor Graves intended to draw in question the authority to give the note. Hickox's admission is express. When he says it was an honest debt against the firm, it must refer to the note; for that was then presented to him. It was an admission that the firm were holden. There is no direct admission by Graves. He does not put this objection on the want of authority, but on other ground. If there was no authority, the presumption is, it would have been suggested; because that disposed of the question at once. Instead of doing so he puts his objection on ground altogether untenable; the commencement of a suit by the plaintiff so quick as to defeat a set-off. This was said after the note was indorsed to the defendants. No matter how soon the plaintiffs prosecuted, they could not,

by that act, gain any advantage. The right to a set-off was valid, provided the plaintiffs were liable on the note. From the facts, I think the court are warranted in presuming the assent of Graves. The defendants are entitled to judgment for seven dollars and fifty-four cents, being the excess of their note over the plaintiffs demand.

Judgment for the defendants.

NOTICE OF DISSOLUTION OF PARTNERSHIP.—That a general newspaper notice of the dissolution of a partnership is sufficient as to all persons who have had no previous dealings with the firm, is held on the authority of this case and *Lansing v. Gaine*, 3 Am. Dec. 422, in *National Bank v. Norton*, 1 Hill, 578; but that actual notice is necessary as to those who have had such dealings, in *Vernon v. Manhattan Co.*, 22 Wend. 193; *Wardwell v. Haight*, 2 Barb. 553; *Conro v. Port Henry Iron Co.*, 12 Id. 54; *Clapp v. Rogers*, 12 N. Y. 287, and *Shurlds v. Tilden*, 2 McLean, 461.

POWER OF PARTNER AFTER DISSOLUTION.—See, on this subject, *Lansing v. Gaine*, 3 Am. Dec. 422; *Rootes v. Wellford*, 6 Id. 510; *Chardon v. Oliphant*, Id. 572, and note; and *White v. Union Ins. Co.*, 9 Id. 726.

PACKARD v. GETMAN.

[6 COWEN, 757.]

DELIVERY OF GOODS TO A CARRIER, by leaving them on the dock near his boat, according to the usual custom, will not render him liable, unless accompanied by express notice.

CASE OR TROVER WILL LIE AGAINST CARRIER for the non-delivery of goods, but to maintain trover a conversion must be proved.

DEMAND AND REFUSAL are *prima facie* evidence of a conversion, but may be rebutted by other evidence.

CARRIER IS NOT LIABLE FOR CONVERSION where goods left on the dock without notice to him are lost, and are not shown to have come to his actual possession.

TROVER for a box of goods. Verdict for the plaintiff and a motion for a new trial. The facts are stated in the opinion.

L. Ford, for the motion.

J. W. Cady, contra.

By Court, WOODWORTH, J. This is an action of trover to recover the value of a box of dry goods, alleged to have been delivered to the defendant as master of a canal boat, to be transported from the city of Albany to Charlestown, in Montgomery county. Two questions arise: 1. Has the plaintiff proved a delivery to the defendant? 2. If he has, is there sufficient evidence of a conversion?

It appeared that before any goods were put on board, the plaintiff requested the defendant to receive a quantity of merchandise;

that he consented, and on the twentieth of November, 1824, gave a receipt for thirty shillings, in full for transporting the plaintiff's goods, described as four boxes of dry goods and other articles. The bill of lading, dated November 24, in the handwriting of the plaintiff, and subscribed by the defendant, states four boxes of dry goods. On the evening of the twentieth of November, the plaintiff came on board; the defendant inquired what dry goods he had, and he replied, four boxes. He then made out the bill of lading, and delivered it to the defendant. It also appeared that no more than four boxes of dry goods were actually received on board, and after being so received, on the evening of the twentieth of November, the plaintiff came and inquired for his goods. He was informed of their reception, went into the room where they were and returned, saying it was all right. The defendant delivered the four boxes according to his contract. On the part of the plaintiff it appeared that five boxes of dry goods had been deposited on the dock, near the defendant's boat, in the evening of the twentieth of November. A man in the boat said the defendant was not on board, and the boxes were left lying on the dock. A person from the boat came and assisted in unloading two of the four boxes brought by one of the cartmen. It also appeared that it was customary for masters of canal boats to receive on the dock goods they were to transport. That the fifth box was brought in the evening and placed on the dock where a boat lay. That some person on board said it was the defendant's boat, and that more goods of the plaintiff were coming on board.

Admitting that according to the usual custom and understanding of parties a delivery on the dock near a boat is a good delivery, so as to charge the carrier, it must always be accompanied with express notice, otherwise he is not answerable. Has that been done in the present case? So far from it, it appears to me that in every stage of this transaction the defendant was informed there were four boxes only. So the plaintiff declared to the defendant; such is the language of the receipt for the freight; and so is the invoice. From all this the defendant was warranted in taking on board four boxes of dry goods; and ought not to be chargeable for not taking on board the fifth box, although it might have been left on the dock. From the evidence, I think the defendant might well presume a fifth box was not intended for his boat. But whether it was or not, there was a failure on the part of the plaintiff to give the defendant information. The plaintiff was probably ignorant that there were more than four boxes. That is his

misfortune, not a ground to charge the defendant, who appears to have acted with good faith; and could not know, from the instructions he had received, that any more than four boxes belonged to the plaintiff. The defendant not having received the fifth box on board, it may by mistake have been put on board another boat, or perhaps stolen; but there is no presumption that the defendant ever converted it. All the facts in the case negative that presumption. I am, therefore of opinion, on the first point, that the plaintiff has not proved sufficient to make a delivery of the goods, and that on this ground the verdict is against evidence.

As to the second question, if it be conceded that the delivery, such as it was, made the defendant answerable, it is necessary to prove a conversion. The plaintiff might have brought a special action on the case against the carrier, and have avoided this question. He has brought trover, which will also lie, but then he is bound to show that the defendant converted the goods. A demand and refusal is *prima facie* evidence of a conversion; but the defendant may give evidence to negative the presumption: *Lockwood v. Bull*, 1 Cow. 330 [13 Am. Dec. 539]. I think it is plain the defendant never had actual possession of the goods. His witnesses swear that all the goods on board were delivered; and it is fairly to be inferred he had no knowledge of any more than four boxes. There is nothing on which to found a presumption that he clandestinely secreted or in any way disposed of the fifth box. On the contrary, if lost to the plaintiff, it was without the defendant's knowledge or interference. On these facts it ought to have been submitted to the jury, whether they were satisfied that the defendant had converted to his own use the goods in question.

The verdict must be set aside, and a new trial granted, with costs to abide the event.

New trial granted.

RECOGNIZED AS AUTHORITY on the following points: That a carrier's liability in respect of goods does not begin until there has been complete delivery to him: *Blanchard v. Isaacs*, 3 Barb. 390; *The R. E. Lee*, 2 Abb. U. S. 51. That delivery at a wharf, etc., is not sufficient without express notice to the carrier, or other person to be charged thereby: *Grosvenor v. N. Y. Cent. R. R. Co.*, 5 Abb. Pr. (N. S.) 348; S. C., 39 N. Y. 36; *Ball v. New Jersey Steamboat Co.*, 1 Daly, 495; and that the notice must be reasonable: *Atlantic Navigation Co. v. Johnson*, 4 Rob. (N. Y.) 498. The principles laid down in *Packard v. Getman*, *supra*, were again affirmed on a second decision in the same case in 4 Wend. 615.

DELIVERY BY CARRIER, SUFFICIENCY OF.—This subject is examined at length in the note to *Ostrander v. Brown*, 8 Am. Dec. 214.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

WICKERSHAM v. NICHOLSON.

[14 **SERGEANT & RAWLE**, 118.]

PAYMENT TO AN INSOLVENT DEBTOR the day after his discharge and assignment is not valid, though the payor has no actual notice of the assignment.

ASSUMPSIT by a trustee for the benefit of Pollin's creditors against Nicholson, who pleaded non-assumpsit and payment. It appeared that Pollin had been discharged as an insolvent debtor, and had assigned his property to the plaintiff. Nicholson, who was indebted to Pollin, paid him the amount of the debt the day after the discharge and assignment, and about two months thereafter the plaintiff gave notice in the papers to Pollin's debtor to make payment to him, the plaintiff. The cause was submitted upon the validity of the payment. Judgment for the defendant. The plaintiff took a writ of error.

Perkins, for the plaintiff in error, cited: Act of twenty-sixth March, 1814, sec. 4; *Cooper v. Henderson*, 6 Binn. 190; Stat. 13, Eliz., c. 7, s. 2; 2 Mad. Ch. 629, 630; Stat. 1 Jac. 1, c. 15, s. 14; Cowp. 569; 5 Serg. & R. 397; 2 Yeates, 520; 1 Burr. 20; 5 T. R. 197; 2 Dall. 276; 4 Id. 370; Sug. Vend. 532.

Chew, contra, cited: 1 Madd. Ch. 548; Reeve's Dom. Rel. 31; 1 Phil. Ev. 306; 1 Gall. 425; 1 Com. Contr. 437; 2 Fonbl. 155; 16 Johns. 85; 8 Serg. & R. 497; 9 Id. 77.

By Court, **DUNCAN, J.** The only question is, whether payment to an insolvent debtor the day after his discharge and assignment, be good. The property of an insolvent debtor passes to the trustee immediately on the assignment, at the

moment of assignment: *Lessee of Wills v. Row*, 3 Yeates, 520. In the assignment of bonds, payment before notice to the obligor of the assignment by the obligee is good. The assignment operates as a new contract between the obligor and assignee, commencing upon notice of the assignment: *Bury, assignee of Binkley v. Hartman*, 4 Serg. & R. 176; *Jones v. Witter*, 13 Mass. 307. In bankruptcy, by Stat. 13 Eliz., c. 7. s. 1, 2, property in the bankrupt vested in the commissioners, from the time of an act of bankruptcy committed; and payments made by a debtor to a bankrupt, after a secret act of bankruptcy, would, under the statute, have been void. The injustice of this relation was so apparent, that parliament, by the Stat. 1, Jac. I, c. 15, s. 14, made such payments, until notice of the act of bankruptcy, good; but still left payments, after commission issued, as they stood under the statute of Elizabeth. This difference between payments after act of bankruptcy committed, and after commission issued has always prevailed. In *Hitchcock et al. v. Sedgwick et al.*, 2 Vern. 162, it was decided that every one was bound to take notice of a commission of bankruptcy when taken out; for that there was a difference where a man divested himself of his estate by his own act, and where it was taken out of him by act of parliament, whereunto all persons are supposed to be parties, and are concluded by it. In *Collet v. De Gols and Ward*, Cas. t. Talb. 69, the lord chancellor said: "A commission is a public act, of which all are bound to take notice; but an act of bankruptcy may be so secret as to be impossible to be known." The assignment may be well considered in the same light as a commission in bankruptcy, which is in the nature of an execution for all the creditors: *Ex Parte Stokes*, 7 Ves. jun. 408.

No doubt the payment in this case was a payment made without actual notice, and it is a hardship on the defendant; but the mischief would be intolerable if the insolvent debtor, the day after his assignment, could go round to his debtors, receive payment, and that payment be good, unless individual notice was given to each of the debtors. This divestment of his debt was by positive law and the assignment a notorious judicial act, of which all the world was bound to take notice. It is constructive legal notice and as binding, to every intent, as actual notice to the individual.

Judgment reversed, and judgment entered for the plaintiff.

KELLOGG v. KRAUSER.

[14 SEDGWICK & RAWLE, 137.]

TO DEFEAT THE LIEN OF A JUDGMENT, declarations of the assignor thereof are admissible against the assignee, tending to prove that at the time the assignor agreed, for value received from the defendant, not to enter up judgment, such judgment had in fact been entered.

A WITNESS MAY BE ASKED HIS OPINION of the value of certain mortgaged land at the time of the entry of judgment on the bond.

A JUDGMENT WOULD NOT BE A LIEN even in the hands of an assignee thereof, where he has notice that the same was entered up at a time when the assignor, for a valuable consideration from the defendant, had agreed that judgment should not be entered.

NOTICE OF SUCH AN AGREEMENT need not be in writing, nor received from a record. Any notice that would leave the party in no reasonable doubt would be sufficient.

COURTS OF COMMON PLEAS HAVE JURISDICTION to entertain a motion to strike out, or open, a judgment entered on a warrant of attorney, or to order a feigned issue to ascertain necessary facts.

IN ERROR. Samuel Krauser and John Krauser, now deceased, gave their bond with warrant of attorney to Foering to confess judgment. Foering assigned to Boyer, who, in turn, assigned to Kellogg. In 1823 judgment was entered by virtue of the warrant. In 1824 a *scire facias* issued, and on the application of the defendant the court of common pleas granted a rule to show cause why the judgment should not be opened, and afterwards directed a feigned issue to ascertain whether this judgment was a lien on Krauser's real estate.

During the course of the trial it was proved that after the entry of the judgment by Boyer, but when neither Samuel nor John Krauser knew that it had been entered, Boyer, in consideration of three hundred dollars, received from Krauser, agreed not to enter up judgment, and said that it had not then been done. The cause came before this court on several exceptions taken, the nature of which appear from the opinion. Verdict and judgment for the plaintiff.

Leavenworth, Hayes and Smith, for the plaintiff in error.

Biddle and Buchanan, contra.

By Court, TILGHMAN, C. J. Several bills of exceptions were taken by the counsel for the plaintiff in the course of the trial of this cause which we are now to consider.

1. The court admitted evidence, on behalf of the defendant, of Boyer's confession before he assigned to Kellogg, that a few days after the entry of the judgment, and when its entry was

unknown to the defendant, he paid to the said Boyer three hundred dollars, in consideration whereof, Boyer agreed not to enter judgment on the bond as long as the interest was regularly paid. The main argument urged by the plaintiff's counsel against this evidence is, that the agreement was impossible to be performed, because the judgment had been already entered, and therefore the defendant should be left to his action against Boyer on the agreement. But this might be a very inadequate remedy, especially if Boyer, as alleged by the defendant, was and is in very doubtful circumstances. The three hundred dollars paid by the defendant, were, it is supposed, over and above the two thousand five hundred dollars, the principal of the bond, and were what Boyer called blood-money. It was a gross fraud to take this money from the defendant, under an agreement not to enter judgment, when judgment had been previously entered. And the court of common pleas would have been justified in ordering the judgment to be erased from the record, on clear proof of the fact. But they did not choose to decide the fact themselves, and therefore directed an issue. Another reason urged by the plaintiff against the evidence is, that the defendant might have pleaded the agreement with Boyer in bar of the *scire facias*. But this is by no means certain, and besides the court of common pleas may, in their discretion, interfere in a summary way, and order an issue, even though the defendant might possibly have obtained redress in another manner. A court of chancery, on proof of the fraud practiced by Boyer on the defendant, might have enjoined him against proceeding on the judgment, and the court of common pleas, having ascertained the fact, may give relief in some manner equivalent to an injunction. I am of opinion, therefore, that there was no error in admitting the evidence.

2. The second bill of exceptions was to the court's permitting the defendant to ask William Witman, one of his witnesses, and in permitting the witness to answer the following question: "What was the value of the mortgaged premises in the possession of the defendant at the time that judgment was entered on the bond?" It seems that the defendant had given a mortgage on real property as a security for the payment of his bond, which property had been sold and the proceeds applied, as far they would go, to the payment of the bond; but they were insufficient to discharge the whole. The principal reason assigned by the plaintiff against this evidence was that an opinion of the value of land is not evidence, because it is

not a fact. It is certain that such opinions are every day received as evidence, although it is true that an opinion is not strictly a fact; and it is difficult to conceive how the value of land can be proved without them. The witness may, indeed, prove the prices at which other lands in the neighborhood were sold; but that would not ascertain the value of the land in question, without a comparison between it and the land which was sold, as to quality, and quality is very much matter of opinion. It is a kind of evidence so commonly admitted without dispute or objection, that I have no doubt of its legality.

3. The third exception was to the charge of the court, in answer to the second proposition of the plaintiff's counsel, "that if Boyer agree not to enter judgment, and declared to the defendant that no judgment had been entered, the effect of such agreement and declaration would be to render the judgment null and void, and it would be a fraud to proceed on the judgment under such circumstances."

That it would be a fraud to proceed on the judgment under such circumstances can not be doubted. And as to the court's saying that the judgment was rendered null and void by the agreement, the objection seems to be a dispute about words rather than substance. In strict propriety of speech, the judgment was not rendered null because it required the judgment of the court to avoid a judgment regularly entered as this was. But the agreement afforded ground for the court's ordering the judgment to be stricken out, which would amount to the same thing. The dispute concerning the lien of this judgment is between the obligor, against whom judgment was entered, and the plaintiff Kellogg, who was an assignee with notice. At least, so the plaintiff alleged, and whether he had notice or not was submitted to the jury, as appears in another part of the case. I take the object of this feigned issue to have been to ascertain facts from which the court of common pleas might be enabled to decide whether it was proper to strike out the judgment or not. I do not think, therefore, that there was any error in this part of the charge.

4. I say nothing as to the fourth error, because it depends on the principle decided in the first.

5. The fifth exception is to the following part of the charge of the court in answer to the plaintiff's fifth proposition: "The plaintiff, Rufus Kellogg, ought not to be affected by the agreement unless he had notice of it. But it is not necessary that such notice should have been recorded, or reduced to

writing. If he had notice in any way before the assignment, he ought to be affected by it." It is not contended that notice must be recorded, or even reduced to writing. The objection is to the words, "if he had notice in any way," which, in the opinion of the plaintiff's counsel, may be extended to any kind of loose, vague, hearsay, imperfect information. If I could agree to that construction of the charge I should say that it was clearly erroneous. The notice ought to be full, and such as could leave the party in no reasonable doubt. But when the judge told the jury that Kellogg could not be affected unless he had notice of the agreement, it ought to be understood, notice of the whole agreement. To give the words a more restrained construction would be criticising beyond the bounds of candor. And when the judge added that notice in any way would be sufficient, I should suppose that he meant notice by parol—notice neither placed upon record nor even reduced to writing. Thus understood, the charge was correct.

7 and 8. The seventh and eighth exceptions are that the court erred in entertaining the motion of the defendant below to open the original judgment, and that they erred in directing a feigned issue to ascertain whether the said judgment was a lien or not upon the defendant's real estate in Berks county.

I must premise that the object of these exceptions is not properly before this court. What we have to do is to decide whether there was error in anything that occurred on the trial of the feigned issue. That is, in form, a complete action, unconnected with the motion to open the judgment, with which we have no concern. But I hope it is not now a matter of doubt whether a court of common pleas can entertain a motion to strike out or open a judgment entered on a warrant of attorney, or to order a feigned issue for the purpose of ascertaining necessary facts. If it has not this power, miserable indeed is our condition. It is the first time I have heard it questioned. It is, and has been for the last half century at least, an undisputed and constant practice. Great frauds are often committed under color of these bonds and warrants, and necessity requires that they should be investigated in a summary way. In some of the states they are absolutely prohibited, on experience of the abuse made of them. And they could be nowhere tolerated without the exercise of a liberal discretion by the courts in inquiring into them. Feigned issues should be encouraged, because without them the court must draw the trial of all facts to itself. Suppose a case of complicated fraud dis-

closed by affidavit. It may depend altogether on matter of fact. And is it not much more agreeable to the spirit of our laws and constitution that this should be referred to a jury than tried by the court? And even if fact were intermixed with law, is there not a great advantage in a mode of trial by which the opinion of the court on points of law can be reviewed by a superior tribunal? If the court decides the whole, on motion, I know of no redress in case of error. But should there be a mistake in the admission or rejection of evidence, or in charging the jury on a feigned issue, a writ of error lies.

I am of opinion, in this case, that the plaintiff in error has not supported any of his exceptions, and therefore the judgment should be affirmed. The record is to be remitted, and the court of common pleas will then make such order as shall seem proper on the motions which have been made, or may be made, touching the original judgment.

Judgment affirmed.

Approved in *Campbell v. Kent*, 3 Penna. 80; *Ingersoll v. Dyett*, 1 Miles, 246; *Gibblehouse v. Strong*, 3 Rawle, 455; *Gallup v. Reynolds*, 8 Watts, 426. Followed in *Banning v. Taylor*, 24 Id. 293; *Whits v. Lieds*, 51 Id. 189; on the power of a court to strike out a judgment entered on a warrant of attorney, in *Penn. R. R. Co. v. Henderson*, 24 Id. 321; and *White Deer Creek Co. v. Sassaman*, 67 Id. 421, on the admissibility of an opinion regarding the value of land; and in *Baker v. Williamson*, 2 Pa. St. 118, upon the power of a court of common pleas, sitting as a court of chancery, to direct an issue.

HAIN v. KALBACH.

[14 SERGEANT & RAWLE, 159.]

PAROL EVIDENCE IMPEACHING BOND.—In an action on a bond given for the debt of a third person, evidence is inadmissible to prove that the obligee had declared that the interest only during his life should be required, and that the bond should become void at his death, unless the obligor proves that such declaration was the inducement to executing the bond.

DEBT. Plea, payment, with leave to give special matter in evidence. The evidence offered was that Bell, Kalbach's intestate, the obligee on the bond sued on in this action had said at the time of the delivery of the bond that he would require only the interest to be paid him during his life-time, and that upon his death the bond should become null and void. This evidence was objected to and rejected. The bond was given by Hain to secure a debt due from one Shaeffer to Bell.

Judgment for the plaintiff. Defendant then prosecuted this writ of error.

Hayes and Baird, for the plaintiff in error, relied upon *Miller v. Henderson*, 10 Serg. & R. 290; *Field v. Biddle*, 1 Yeates, 132; *Hill v. Ely*, 5 Serg. & R. 363 [9 Am. Dec. 376].

Buchanan and Biddle, contra.

By Court, GIBSON, J. Had the defendants below offered to prove that they were induced to execute the bond in consequence of the representations of Bell, the plaintiff's intestate, that only the interest should be exacted during his life, and that the principal should not be called for after his death, the case would have fallen within the principle decided in *Miller v. Henderson*, but in this particular it was entirely deficient. It is no answer to say the jury might have believed from the intrinsic evidence of the transaction itself, that Bell's promise was the moving consideration on which the defendants became personally liable for the debt of Leonard Shaeffer, who died in doubtful circumstances. It may be so. But we are to recollect that evidence of this kind is always attended with a greater or less degree of danger, and that sound policy requires it to be restricted to cases of clear and palpable fraud, where the evidence, if believed, will not leave the jury to grope for a case proper for relief. Were juries permitted to weigh probabilities in cases of this sort, there are few securities that would not be swept away by parol evidence of idle and extravagant expressions at the sealing and delivery. Where a fraud of this kind is alleged, the evidence in support of it must come fully up to the mark, so as not to leave the conclusion to be drawn from it doubtful, taking the evidence to be true in fact. In this respect it was deficient, and we are of opinion it was properly excluded.

Judgment affirmed.

Cited in *Martin v. Berens*, 67 Pa. St. 462, upon the general inadmissibility of parol evidence to vary a written instrument; in *Rearick v. Swinehart*, 11 Id. 241, and in *Caulk v. Everly*, 6 Whart. 306, as recognizing the power of a parol understanding or agreement to defeat, in whole or in part, a specialty for the payment of money, where the understanding was the inducement leading to the execution of the specialty.

SHEETS v. HAWK.

[14 SERGEANT & RAWLE, 173.]

THE RECORD OF DISCHARGE OF AN INSOLVENT DEBTOR is conclusive that he complied with all things required by law to entitle him to a discharge and can not be inquired into collaterally.

FORFEITURE OF BAIL BOND.—The non-appearance of the debtor until the fourth day of the term appointed for hearing his petition, will not alone work a forfeiture of his bail bond, his counsel being present and procuring a continuance from day to day.

DEBT on the bail bond given by Adam Hawk and Stephen Rigler to the plaintiff, an arresting creditor of Hawk. The condition of the bond was that Hawk should appear before the court of common pleas on the first Monday of the August term, 1822, to take the benefit of the insolvent laws and surrender himself to the jail of the county if he should fail to comply with all things required by law to entitle him to be discharged and to abide by the orders of said court. It appeared that Hawk was present on the first Monday of the August term, and that the first day of the following term was appointed for the hearing and notice to creditors ordered to be given. Hawk was not present on the first day of the next term, but his counsel was present and asked a continuance from day to day, and on the fourth day of the term Hawk presented himself and was discharged. The record of this discharge was produced at the trial and evidence offered of the publication of the notice, and that Sheets's counsel, one Wright, affirmed to be the real party in interest, had actual notice, and endeavored to make arrangements with Hawk that would render it unnecessary for him to take the benefit of the act. This evidence was received against plaintiff's objection. The court charged the jury in favor of the defendants, and the verdict being for them the plaintiff prosecuted his writ of error.

Wright and Norris, for the plaintiff in error.

Weidman and Elder, contra.

By Court, DUNCAN, J. The plaintiff insists that inasmuch as it does not appear by the record that Hawk did not appear on the first day of the term, the bond is forfeited, and the bail has become liable. If this be so, it is a matter of the strictest law, and an exaction of great rigor; for it does appear that the party having the beneficial interest had notice that the insolvent was not discharged on the first day of the term, and endeavored to

obtain from him security for a part of his debt, persuading him not to take the benefit of the act. Looking at the state of the record, and not inquiring further, the condition would appear to have been complied with. The term is but one day in strictness. Continuances from day to day are not usually entered as continuances from term to term are. Where, as in the city of Philadelphia, hundreds sometimes are to come out on the same day, on notices to appear on the same day, they can not all be discharged. Indeed the common routine of business generally occupies the first day; impaneling the grand jury, charge to the grand jury, calling and receiving returns of constables, forfeiting the recognizances of parties and witnesses who do not appear; and I believe that it rarely occurs that the court of common pleas begin to act on the first day of their session. It must be presumed, unless the contrary appear by the record, that the party complied with all things required by law to entitle him to be discharged, and generally abode all orders of the court. *Omnia presumantur rite acta.* The court was competent to discharge; they have discharged; they have decided that the insolvent has complied with all things required by law to entitle him to his discharge; that he has abode by all orders of the court; and this is all the bond covenanted he should do.

Now, as it appears on the record that the court had jurisdiction to discharge, and as they have exercised that legitimate power, it can not consist with the general analogy of the law that in a collateral action there can be any inquiry on the facts which they have decided. The record is as conclusive in that case, as it is in any other of which they have jurisdiction. It was not a nullity. The insolvent debtor, with that discharge in his hand, was free from arrest. He was discharged by competent authority. In *Lester v. Thompson*, 1 Johns. 300, it was determined that the discharge of an insolvent debtor was conclusive as to the facts. If this cause went back on the exception to the evidence, it would be a hopeless one on the part of the plaintiff, because his exception is, that the whole must depend on the record of the court; and on the record he has no case. But the evidence excepted to, although unnecessary, did not go to contradict the record, and I think the court may inquire of their own officers, and attorneys are officers of the court in this respect, what the course of business is. The proof of that practice was that on an application of the attorney of an insolvent debtor, the court will postpone the day of hearing, and continue it from day to day during the term; and the attorney

of the insolvent debtor proved the fact that the case of this insolvent debtor was continued from day to day; and even if it had been necessary that the continuance should appear of record, the court would direct the prothonotary at any time so to amend the record by the insertion of the order for continuance; for the attorney of the insolvent swears that the court, on Hawk's not appearing on his application, continued the hearing from day to day. The court had authority so to do. We are not now to inquire why they exercised this discretion. The reason for the continuance is never stated in the record, and if it was, this court, in this indirect manner, can not reverse the sentence of discharge, though they might conceive that the reason for granting the continuance was not a sufficient one. The insolvent might have been taken sick, or broken his leg in his way to the court; the waters might have been impassable; many accidents might have occurred to have made it the duty of the court to continue the hearing, and we must suppose the court has done its duty.

Judgment affirmed.

Followed in *Fritts v. Doe*, 22 Pa. St. 336; *Hoffman v. Coster*, 2 Whart. 473; *Gallagher v. Kennedy*, 2 Rawle, 165; *Lease v. Asper*, Id. 184; *Shriver v. Commonwealth*, Id. 207; *Cohen v. Patton*, 2 Miles, 439; *Heilner v. Bast*, 1 Pa. 270, as deciding that the record of the discharge of an insolvent debtor is conclusive as to the fact of his having complied with all things necessary to entitle him to a discharge.

WITHERS' APPEAL.

[14 SERGEANT & RAWLE, 185.]

EQUITABLE CONVERSION OF REALTY.—An heir's interest in the land of his father, is an interest in realty, even after an order of probate to sell the same, until the sale has taken place; and no parol agreement can convert it into personalty so as to affect the lien of a third person.

APPEAL from the decree of the orphans' court, on a citation to Michael Withers, jun., and others, to show cause why a certain judgment of John Evans against Michael, should not be paid first out of the proceeds of his father's estate, sold under a decree of the orphans' court. It appeared that Michael was indebted to his brother John in the amount of a certain judgment against Michael, which John paid at his request. The judgment was paid in July, 1814; and it was agreed between Michael and John that John should retain in his hands, to discharge this indebtedness, certain moneys which he expected, as

administrator of their father's estate, to receive under an order of the orphans' court to sell the land belonging to the estate. Their father died in December, 1813, and the order was made in March, 1814. Part of the land was not sold until 1821. In October, 1814, John Evans obtained a judgment against Michael Withers, jun. And the question was whether the order of the orphans' court, directing a sale of the real estate, and the agreement between Michael and John, operated to divest Evans's judgment of a lien on the realty so as not to entitle it to preference. The decree of the orphans' court was that John Withers had no lien for the amount of his claim, and that Evans's judgment was entitled to preference. John Withers appealed.

Hopkins, for the appellant.

Park, *contra*.

By Court, DUNCAN, J. I refer to the case stated on the appeal for the facts, and on that statement, proceed to give the opinion of the court. The interest of Michael Withers in his father's lands, until it was sold by the administrators, continued real estate. It was not possible, by mere words, to convert it into personal property so as to affect the lien of any third person; the judgment of Evans assigned to Eshelman bound it at law. Nothing could be more pernicious than cases of parol trust or secret understanding, and nothing could be more secret than the trust set up by the appellant, for it is not only not reduced to writing, but there is no witness to prove it, except Michael Withers himself. There would be no safety if these secret acts between brothers, locked up in their own breasts, relative to their father's estate, should prevail against *bona fide* judgments by strangers.

If this claim can be supported, it must be because a trust was created for no legal estate passed; and if such a trust were to prevail it would be repealing the act of frauds and perjuries, which enacts that no estate or interest in lands shall be created by parol only, and no trust can be raised by mere words, unless where it is raised by the act and operation of law. A departure from the wholesome provisions of the clear and positive enactments of that act, of which it has been said by English jurists, that every line of it deserved a subsidy, has been regretted, and judges instead of extending the exceptions, are drawing in and conforming to the statute. It must be conceded that at law no interest in the land passed to John Withers. Although the seventh section of the statute of frauds,

which enacts that all declarations or confessions of trust or confidence of any lands, etc., shall be manifested and proved by some writing, is not incorporated in our law, yet in substance it is comprehended in the first section of the act: "No interest in land, either in law or equity, shall pass by parol only, any consideration for making the agreement to the contrary notwithstanding, except for a term not exceeding three years; nor except by deed or note, in writing, signed by the party, or by the act and operation of law." Trusts arising by act and operation of law are where trust-money has been laid out in lands, or where one man pays the money, and the conveyance is to another. These and cases falling within the same reason, are the only cases of resulting trusts by act and operation of law, which are within the exception in the act of assembly: *Wallace v. Duffield*, 2 Serg. & R. 521 [7 Am. Dec. 660]. To raise a trust by act and operation of law, an actual payment by *cestui que trust* must be shown to have been made at the time of the purchase: *Stiner v. Stiner*, 5 Johns Ch. 1.¹ Cases of fraud are always exceptions between the parties to the fraud.

It is said that these brothers had a right to enter into the agreement; that one who had advanced money for the other should be paid out of the father's descended estate, because no other right had then interfered. So they had, but these agreements, to have a binding effect on others, must be in the mode pointed out by the law, and if they are not, they can not bind the legal rights of others. They can not deprive a creditor of the security he has obtained by an agreement, which the law says shall pass no interest in the land, and where the application is made to a court of chancery, that court never would grant relief to such secret trust as this, nor take a plank from a creditor. It is further said this was a pledge. I know of no effectual pledge of land but a mortgage. Now, if this had been a mortgage, the law requires it to be published by record; thus showing that the law will not tolerate a secret pledge of land. Make the most of *John Wither's case*, the agreement was a security for indemnity, by parol, on land. The land was not in his hands further than as he was the instrument, the attorney, the officer of the law to make sale. The accident of his being co-heir makes no difference, the same consequence must arise if the party was a stranger. The equity of the judgment-creditor is not only equal to that of the appellant, but it is superior; he

1. This should be *Steele v. Steele*, 5 Johns. Ch. 1.

has both the law and equity on his side, and must prevail. This principle is so familiar that it would be a waste of time to cite authorities to prove it.

The object of all registering acts is to protect third persons, but not to enable the parties themselves to set it up against their own acts. In England, where title-deeds are deposited with an agreement to mortgage, this has been treated in the light of an equitable mortgage. But it is apprehended, that one who purchases in a register county, without notice of the deposit and agreement, would be protected. He certainly would here. An unrecorded mortgage will not prevail against a subsequent judgment. It would be a matter of astonishment to find the law so inconsistent as that a man who has obtained a formal mortgage, which he neglects to record, should be postponed to subsequent judgment, and yet, that a parol agreement, known only to the contracting parties, and established only by the oath of one of them, should prevail against such judgment. If it was in writing it could not, or the registering act is a dead letter. That it should be set up as a parol agreement, and obtain, because it was not reduced to writing, if when it had been reduced to writing but not recorded, it would be void, would be an obliquity not to be found in the law.

I am of opinion that the decree of the orphans' court should be affirmed.

Decree affirmed.

Cited in *Hill v. Meyers*, 43 Pa. St. 172, as favoring the principle that the payment of the purchase-money will not take parol purchase of lands out of the statute of frauds; in *Lancaster Co. Bank v. Stauffer*, 10 Id. 399, as deciding that a parol agreement concerning lands can not convert them into personalty, to defeat the lien of a third person. And in regard to parol agreements concerning land, this decision is further referred to in *Gratz v. Gratz*, 4 Rawle, 435, and upon what is a resulting trust, in *Gibblehouse v. Strong*, 3 Id. 445.

MARTIN v. MATHIOT.

[14 SERGEANT & RAWLE, 214.]

FRAUDULENT SALE OF CHATTELS.—An agreement upon the sale of personal property, that the vendee shall have possession, but that the property shall remain in the vendor until the purchase-money is paid, is fraudulent against creditors and the sheriff.

TRESPASS. The defendant justified as sheriff. It appeared that the defendant levied an execution upon four horses and

their harness, in the possession of one Michael, as his property. The plaintiff claimed that the horses were his property, and that they were not to belong to Michael until he had paid plaintiff the amount of a certain indebtedness. The opinion of the court was, that if vendor and vendee agree that possession shall pass to the vendee, but the property remain in the vendor until the whole purchase-money is paid, such agreement as respects creditors and the sheriff, is fraudulent, and it is immaterial whether it appear that the creditor trusted the debtor on the credit of the goods, which were in his possession, or not. Plaintiff excepted.

Slaymaker, for the plaintiff in error, cited: *Hussey v. Thornton*, 4 Mass. 405 [3 Am. Dec. 224]; *Clow v. Woods*, 5 Serg. & R. 286 [9 Am. Dec. 346]; *Waters v. McClellan*, 4 Dall. 208; 1 Cranch, 316.

W. Hopkins and Hopkins, contra, cited *Palmer v. Hand*, 13 Johns. 434 [7 Am. Dec. 392]; *Babb v. Clemson*, 10 Serg. & R. 419 [13 Am. Dec. 684], and examined the cases relied upon by the opposing counsel.

By Court, TILGHMAN, C. J. I can not say that I perceive any error in the opinion of the court of common pleas. Possession of personal property is the great mark of ownership. It is almost the only index which the world in general has to look to; but there are exceptions. There are certain necessary and lawful contracts, by which the owner parts with the possession, and yet fraud can not be presumed. Such are the contracts of lending and hiring, both very useful, and without which society could not well exist. It is of the essence of these that the owner should give up the possession for a time. Such, too, are contracts by which an artisan or manufacturer has the possession of materials belonging to another, for the purpose of making them up, or repairing them for the owner. No suspicion of fraud can fairly arise where the transaction is in the usual course of business; but the case is very different where it is intended that the property should be apparently in one, while it is, in fact, in another. This is out of the usual course of business, unnecessary, and directly tending to the injury of those who are not in the secret. In the present instance, for example, there was a sale of four horses and harness, and possession delivered to a man who got his living by the use of his team. All the world had a right to suppose that he was the owner of the horses which he drove, and a secret agreement to the contrary

was an injury to society, by giving the wagoner a false credit, which might induce others to trust him with their property. The cases which have generally been brought before courts of justice are those in which the seller has remained in possession. Those have been adjudged fraudulent. There are innumerable authorities on this subject, but I will refer particularly to *Clow v. Woods*, 5 Serg. & R. 286 [9 Am. Dec. 346], and *Babb v. Clemson*, 10 Id. 419 [13 Am. Dec. 684], because they were in this court well considered and recently decided. The principle which governed them was, that a sale, where possession does not accompany and follow it, is fraudulent as to creditors. It was the separation of the possession from the property which made the fraud, and the principle applies to the case before us. Here the seller did not retain the possession, but was to retain the property after he had transferred the possession to the buyer. The mischief is the same, a false credit is given, and whether given to the buyer or seller is immaterial. Neither is it necessary that it should appear that credit had been given by a third person in consequence of the possession of the purchaser. A rule of law so restricted would be of very little value. It rarely occurs that a man can prove what it was that induced him to give credit. It is a rule of general policy which declares possession to be the evidence of property, and the presumption is, that every man is trusted according to the property in his possession. When the plaintiff put his horses into the possession of Michael, he knew that he was making Michael the ostensible owner, and was bound to abide the consequences. Between themselves there is no objection to the property remaining in the plaintiff; but as to the sheriff, who knew nothing of the secret condition annexed to the sale, Michael, who was the apparent, is to be considered as the real owner.

I am of opinion that the judgment should be affirmed.

Judgment affirmed.

FOLLOWED as showing, that the vendor of personal property has no lien for the purchase-money, where the property has been delivered to the vendee, in *Haak v. Linderman*, 64 Pa. St. 501; that an agreement between the vendor and vendee of personalty, that the property should remain in the former, although the latter has possession, is not valid as against the vendee's creditors, in *Waldron v. Haupt*, 52 Pa. St. 411; *Chamberlain v. Smith*, 44 Id. 433; *Stiles v. Whittaker*, 1 Phila. 271; and upon fraudulent sales this case is cited in *Rose v. Story*, 1 Pa. St. 196; *Lehigh Co. v. Field*, 8 Watts & S. 241; *Streeper v. Eckart*, 2 Whart. 306; *Hower v. Geesaman*, 17 Serg. & R. 254; *Farrell v. Nathans*, 1 Phila. 557; *Henkels v. Brown*, 4 Id. 301.

In *Lehigh Co. v. Field*, 8 Watts & S. 232, the principal case was cited as determining in the one before the court. One fact, however, was pointed

out, which distinguished the two cases. It was this; that although there was an executory contract for the sale of a boat to a certain person, upon the payment of the price, and the boat was in the possession of that person, it appeared that this person was the servant of the owner, and in his employ; and the court said that his possession was the possession of the owner, and that the boat could not be levied upon as the property of the vendee.

BOMBAY v. BOYER.

[14 SHERMAN & RAWLE, 253.]

TIME OF CONTINUANCE OF JUDGMENT-LIEN is to be determined by the record, and not by any private agreement of the parties not appearing thereon. **ESTIMATING THE STATUTORY TIME** from the date of the judgment, is not inequitable, although the purchaser, at the time of his purchase, was informed that the execution could not be issued until a time less than five years before his purchase.

SCIRE FACIAS issued by Boyer against Bombay, the administrator of Bower, and Kline. It appeared that in December, 1808, judgment was confessed by Bower in favor of Boyer for one thousand three hundred pounds. No declaration was filed, so that nothing appeared of record but a judgment in an action of debt. The fact was, however, that the judgment was confessed on a bond conditioned for the payment of six hundred and fifty pounds on the first of May, 1809; this bond, itself being security for the payment of several bonds from one Fisher to Bower, dated July 9, 1807, the first of which was payable May 1, 1812, and the others annually thereafter. These bonds Bower had assigned to Boyer. In April, 1814, Kline, the co-defendant, purchased land of Bower, and which had belonged to Bower at the time the judgment was confessed, knowing the circumstances. More than five years had elapsed from the date of the judgment to the time of issuing the *scire facias*; but five years had not elapsed from the time the bond was payable on which the judgment had been confessed, nor from the time of payment of the Fisher bonds. On these facts the court below was of opinion that the lien of the plaintiff's judgment continued for five years after the time of payment of the bond on which judgment had been confessed, viz., May 1, 1809, because no execution could be taken out before that time; and they were also of opinion, that if Kline purchased with notice of the real nature of the bond whereon judgment was entered, he was bound, in equity, not to take advantage of the expiration of the five years from the date of the judgment. The defendants excepted and took this writ of error.

Hepburn and Bellas, for the plaintiffs in error.

Greenough and Greer, contra.

By Court, TILGHMAN, C. J. This case depends on the act of the fourth of April, 1798, by which the lien of judgments on lands is limited to five years. The facts are as follows. [The chief justice here stated the facts and the opinion of the court below.] In both these opinions of the court of common pleas I think there was error.

1. The act of the fourth of April, 1798, is entitled "An act limiting the time during which judgments shall be a lien on real estates," etc.; and in the case of the *Bank of North America v. Fitzsimmons*, 3 Binn. 358, it is considered as of the nature of an act of limitations. Its words are clear and positive: "That no judgment shall continue a lien on the real estate of the person against whom such judgment shall be entered, during a longer period than five years from the first return-day, of the term of which such judgment may be entered," unless revived in the manner prescribed in that act. It was decided by this court, in *Pennock etc. v. Hart*, 8 Serg. & R. 369, that where the judgment was entered with a stay of execution on record, the five years should run only from the time when the stay of execution expired. But it was not our opinion that any regard should be paid to a stay of execution agreed on by the parties but not appearing on record. Such a construction would be a departure both from the letter and spirit of the law. It has always been the policy of our law to facilitate the sale and transfer of real estate to which liens were found to be a considerable impediment. In pursuance of this policy, the act in question was made, to which we gave a liberal construction in the *Bank of North America v. Fitzsimmons*, by deciding that judgment-creditors stand upon the same footing as purchasers. The record is to be looked to, and the commencement of the five years determined from that alone. Now, in the case before us, all that appeared on the record was the entry of the judgment on a certain day, without any mention of the condition of the bond. Its real intent was a secret known only to the parties. If people will hang out false colors they must take the consequences. Between themselves it is all very fair that their agreement, however secret, should be carried into execution; but it would be most unreasonable to involve strangers in the difficulty and peril of searching beyond the record.

2. Neither is it against equity that a purchaser should insist

on counting the five years from the date of the judgment, although he was informed, before he made the purchase, that by the condition of the bond, or a private agreement of the parties, execution could not be issued on the judgment until a time less than five years before his purchase. His conscience was not burdened with circumstances of that kind. He saw that by the plain enactment of the law, the land of Bower was discharged from the lien of the plaintiff's judgment. He was no way concerned in the transactions of the parties to that judgment. He had received no consideration nor entered into any engagement with either of them, which should preclude him from taking advantage of the law. The case is not similar to those which have arisen on the registering acts, where it has been decided that although the statute declares that a deed shall be of no effect unless registered within a certain time, yet equity will support it against a subsequent purchaser who had notice of the unregistered deed. It was thought to be against good conscience thus voluntarily to step in and assist the vendor in defrauding the careless vendee, who had neglected to put his deed on record. In the present case the plaintiff had paid no money for his lien. It was a legal advantage which he had gained by compulsion. The law gave him the lien, and the law deprived him of it. A subsequent purchaser, therefore, might, with good conscience, insist on the law. I will add that this liberty which courts of chancery have taken with statutes, in contradicting and almost annihilating their provisions, has introduced great uncertainty, and would not be carried so far since our experience of its inconvenience, if our steps could be retraced without shaking the foundations of property. But repeated decisions become a rule of property, which cannot be departed from without doing a greater mischief than that which it is intended to remedy. As respects the act of assembly, which we are now to construe, we are fettered with no decisions which militate with its provisions. It is best, therefore, to adhere to a construction which shall effectuate its plain intent, and not say that it is against conscience for a purchaser to govern himself by the law as he sees it written. I am of opinion that the judgment should be reversed and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

Followed as deciding that the agreement of a debtor that a lien should continue beyond the statutory period, although the provision of the law be not pursued, is not binding on a purchaser, though with notice thereof, in *Hemp-*

Mill v. Carpenter, 6 Watts, 24; and to the same effect in *Wallace's Appeal*, 5 Pa. St. 106, and in *Betz's Appeal*, 1 Pa. 277. Upon the authority of the principal case, the lien of a judgment is held to expire five years from the first day of the term in which it was entered, unless a *scire facias* to revive it be sued out, or where there is a stay, in *Brown v. Simpson*, 2 Watts, 242.

RERICK v. KERN.

[14 SERGEANT & RAWLE, 267.]

A PAROL LICENSE, WITHOUT CONSIDERATION, to use the waters of a stream for a saw-mill, can not be revoked at the grantor's pleasure, where the grantee, in consequence of the license, has erected a mill.

ACTION on the case, for diverting a water-course, whereby plaintiff lost the use of his saw-mill. It appeared that Kern, the plaintiff below, being about to erect a saw-mill on a stream known as the right hand stream, his millwright found a better seat on the left hand stream. Kern thereupon applied to Rerick for permission to divert the water from the right hand stream to the left hand. The permission was granted, and Kern thereupon built his mill upon the left hand stream. Without the aid of the water from the right hand stream, the water in the left hand stream would have been wholly insufficient. No deed was executed, nor any consideration given by Kern; but he erected his mill on the left hand stream, in consequence of the permission, and it was doing a good business, and was in good condition, when Rerick revoked the license by removing the stones laid to divert the water.

CHAPMAN, president of the court of common pleas, charged the jury as follows: "Two questions arise in this cause. The first is, whether Henry Rerick, after permitting and agreeing that Henry Kern should turn the water from the right hand stream to the left hand stream, when, if he had not given that permission, he would have built his mill upon the right hand stream, can he, Henry Rerick, afterwards withdraw his permission, and thereby destroy the use of Kern's saw-mill? His withdrawing that permission after the mill was built, by removing the stones laid for the purpose of turning the water, if the jury believe these facts would be a fraud and imposition upon Henry Kern, and he would have no right to remove them. But if he had withdrawn his permission, and removed the dam before Henry Kern was at the expense of building a mill, he would have been justifiable in so doing. Or if the permission was by

parol to enjoy a right which could only pass by grant for a consideration, it would be within the statute of frauds and perjuries, and not good in law. But if the jury believe the act was fraudulent in Henry Rerick, he is liable to pay damages to Henry Kern for the injury done him. Of the amount of the damages the jury are the judges. The second question, if the jury believe that no fraud has been committed by Henry Rerick, is, did Rerick, by removing the dam, divert the water from the left hand stream, so as to leave less water running in the left hand stream than there was formerly before the dam was erected? This is a fact for the jury, and if the jury believe that Rerick has diverted the water from the ancient channel, which he had no right to do to the injury of Kern, and that Kern has suffered damage thereby, the jury are to determine to what amount, if any damage, the plaintiff has suffered."

The court was requested, by the counsel for the defendant, to instruct the jury in the following manner:

1. "That if Rerick, about the year 1811, did allow the plaintiff, as proved by William Teats, to place an obstruction in the natural channel of one branch of the stream on Rerick's own land, yet that being without any consideration, and merely by parol, no legal right to the stream, or the use thereof, passed thereby to Kern; but Rerick had a right at any time to remove the said obstruction, so that the water could flow at any time in its natural channel.

Answer. "In answer to the first question, he would have a right to remove the said obstructions before Kern had incurred the expense of building a saw-mill on the faith of Rerick's promise, or he would have had a right, if the permission or promise had been after the building of the mill, but not after he had induced Kern to be at the expense of building the mill.

2. "That an action for diverting an ancient water-course does not lie for removing an artificial obstruction from the natural channel, whereby the water was made to flow as it used to do from time immemorial.

Answer. "That is the general principle of the law; but to this there are exceptions, where, by so doing, the party commits a fraud, and an action will lie.

3. "That if the jury believe the whole evidence exhibited by the plaintiff in this cause, Rerick could legally, in the fall of 1821, remove the dam placed in the forks of the stream by Kern, on Rerick's land, and for removing the same, no action lies, whether Kern sustained thereby a loss or not.

Answer. "If the jury believe that there was no fraud in Rerick's removing the dam, in which case he would have a legal right to do it, no action would lie.

4. "That if the jury believe the water, ever since the removal of the obstruction at the forks, has run and continues to run in its natural channel, as it used to do from time immemorial, their verdict should be for the defendant.

Answer. "If the jury so believe, and that no fraud was committed by removing this obstruction or dam, then your verdict should be for the defendant."

Defendant excepted to the opinion of the court, both in their charge to the jury, and in their answers to the several propositions submitted to them.

Greenough, for plaintiff in error: 1. The bare permission to erect a dam on the defendant's land, without deed and without consideration, will not deprive defendant of his property. The right to a water-course is an incorporeal hereditament, which can only be passed by a deed, and can not be claimed under a parol grant: *Angell on Water-courses*, 41; 3 Bac. Abr. 386. An interest vests where the agreement is executed, and a valuable consideration passes: *Le Fevre v. Le Fevre*, 4 Serg. & R. 241 [8 Am. Dec. 696]. In the case before the court there was no contract, nor any consideration given to the plaintiff below: *Dexter v. Hazen*, 10 Johns. 246; 2. There was no evidence of fraud, yet the judge left it to the jury to presume fraud; facts being undisputed, fraud is a question of law: *Sturtevant v. Ballard*, 9 Johns. 342 [6 Am. Dec. 281].

Lashells, contra: 1. That plaintiff having obtained defendant's permission to erect the dam, it would be unjust to suffer the defendant to retract the license he had given: *Syler v. Eckhart*, 1 Binn. 178. 2. A parol license can not be retracted without paying the expenses incurred in consequence of the license: 2 Esp. N. P. 268, (Gould's ed. 636); *Le Fevre v. Le Fevre*, 4 Serg. & R. 241 [8 Am. Dec. 696].

By Court, GIBSON, J. To the objection, that an action for diverting an ancient water-course, is not supported by evidence of the removal of an artificial obstruction, it is sufficient to answer that, in the case before us, the right depends, not on the antiquity of the water-course, but on the agreement of the parties; and the question, therefore, is, would equity carry this agreement into effect?

That such an agreement may be proved by parol, was settled

in *Le Fevre v. Le Fevre*, 4 Serg. & R. 241 [8 Am. Dec. 696], which in this respect goes as far as the case before us. The defense there was, that the right being incorporeal and therefore lying in grant, could pass only by deed. But as the agreement was for a privilege to lay pipes, it is evident that the right acquired under it, was no further incorporeal than that which passes by the grant of a mine, or of a right to build, which indisputably vests an interest in the soil. A right of way, which has been thought to approach it more nearly, in fact differs from it still further. But the defense, in this case, is put on other ground, it being contended that a mere license is revocable under all circumstances and at any time.

✓ But a license may become an agreement on valuable consideration; as where the enjoyment of it must necessarily be preceded by the expenditure of money; and when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it as soon as the benefit expected from the expenditure is beginning to be perceived. Why should not such an agreement be decreed in specie? That a party should be let off from his contract, on payment of a compensation in damages, is consistent with no system of morals but the common law, which was in this respect originally determined by political considerations, the policy of its military tenures requiring that the services to be rendered by the tenant to his feudal superior, should not be prevented by want of personal independence. Hence the judgment of a court of law operates on the right of a party, and the decree of a court of equity on the person. But the reason of this distinction has long ceased, and equity will execute every agreement for the breach of which damages may be recovered, where an action for damages would be inadequate remedy. How very inadequate it would be in a case like this, is perceived by considering that a license which has been followed by the expenditure of ten thousand dollars, as a necessary qualification to the enjoyment of it, may be revoked by an obstinate man who is not worth as many cents. But, besides this risk of insolvency, the law, in barely compensating the want of performance, subjects the injured party to risk from the ignorance or dishonesty of those who are to estimate the *quantum* of the compensation. In the case under consideration, no objection to a specific performance can be founded on the intrinsic nature of the agree-

ment, nor having been partly executed on the circumstance of its resting in parol; but it is to be considered as if there had been a formal conveyance of the right, and nothing remains but to determine its duration and extent.

A right under a license, when not specifically restricted, is commensurate with the thing of which the license is an accessory. Permission to use water for a mill, or anything else that was viewed by the parties as a permanent erection will be of unlimited duration, and survive the erection itself, if it should be destroyed or fall into a state of dilapidation; in which case the parties might, perhaps, be thought to be remitted to their former rights. But having had in view an unlimited enjoyment of the privilege, the grantee has purchased, by the expenditure of money, a right, indefinite in point of duration, which can not be forfeited by non-user unless for a period sufficient to raise the presumption of a release. The right to rebuild, in case of destruction or dilapidation, and to continue the business on its original footing, may have been in view as necessary to his safety, and may have been an inducement to the particular investment in the first instance. The cost of rebuilding a furnace, for instance, would be trivial when weighed with the loss that would be caused by breaking up the business and turning the capital into other channels; and therefore a license to use water for a furnace would endure forever. But it is otherwise, where the object to be accomplished is temporary. Such usually is the object to be accomplished by a saw-mill, the permanency of which is dependent on a variety of circumstances, such as an abundance of timber, on the failure of which the business necessarily is at an end. But till then it constitutes a right for the violation of which redress may be had by action. With this qualification it may safely be affirmed that expending money or labor, in consequence of a license to divert a water-course or use a water-power in a particular way, has the effect of turning such license into an agreement that will be executed in equity. Here it was not pretended that the license had expired, and we are unable to discover an error in the opinion of the court on the points that were propounded.

Judgment affirmed.

LICENSE TO USE OR ENTER UPON REALTY.—See this subject discussed in the note to *Ricker v. Kelly*, 10 Am. Dec. 38.

In Pennsylvania, the authority of *Ricker v. Kern*, is repeatedly recognized. The case is included among the American Leading Cases, vol. 1, and is approvingly referred to in the following: *Hepburn v. McDowell*, 17 Serg. & R.

384; *Killip v. McIlhenny*, 4 Watts, 322; *Swartz v. Swartz*, 4 Pa. St. 358; *Campbell v. McCoy*, 31 Id. 263; *Meigs' Appeal*, 62 Id. 34; *Kay v. Penn. R. Co.*, 65 Id. 269; *Dark v. Johnston*, 55 Id. 164; *Thompson v. McElarney*, 82 Id. 174. In this state, the doctrine is well settled that a parol license, executed by an expenditure of money and labor, is irrevocable, where no other remuneration to the licensee would be adequate than the continued enjoyment of the license. This is undoubtedly a vexed proposition, and, as supplementary to the treatment of this general subject given in the note above adverted to, the course of judicial decision upon it will be pointed out. Referring to the principal case and others bearing on the subject of a parol license, Judge Strong, delivering the opinion of the court in *Huff v. McCauley*, 53 Pa. St. 206, 209, says, that a license executed by expenditures of labor and money, will be treated in equity as a contract giving absolute rights to the licensee, who will be protected in the enjoyment of them, and then admits that in this respect the courts of Pennsylvania have gone beyond the common law, and beyond the rulings of courts of equity elsewhere. The reason of the doctrine contended for by this and other decisions pronounced by the same court, is that after the execution of the license, it would be a fraud on the licensee to permit a revocation; and the principles of equitable estoppel are invoked to prevent what would work a great hardship in many instances. But where there has been no expenditure on the faith of a license, there is no foundation for an estoppel, and the same reason does not exist for holding it irrevocable. Even if there has been consideration paid, there is nothing in the way of restoring the parties to their original condition: *Huff v. McCauley*, 53 Pa. St. 206. "No case in this state," says the court, in this citation, "has gone to the length of ruling that it is converted into a contract giving irrevocable interests in or out of lands, by the mere fact that a consideration was agreed to be paid or allowed for it." From this opinion it would seem that where the parties may be restored to their original condition, there is no reason to resort to an estoppel. And such is the construction placed upon the Pennsylvania doctrine in 1 Washb. on Real Prop., sec. 400.

The following parol licenses were held irrevocable by reason of the expenditure of money and labor on the faith of them: To lay conduit pipes through the licensor's land: *Le Fevre v. Le Fevre*, 4 Serg. & R. 241; S. C., 8 Am. Dec. 696; to flood the licensor's land: *McKellip v. McIlhenny*, 4 Watts, 317; *Campbell v. McCoy*, 31 Pa. St. 263; to erect structures thereon: *Meigs' Appeal*, 62 Id. 34; or to sink oil wells: *Dark v. Johnston*, 55 Id. 164.

Adopting the Pennsylvania doctrine are the decisions of Indiana: *Snowden v. Wilas*, 19 Ind. 10; *Stephens v. Benson*, 19 Id. 367; *Lane v. Miller*, 27 Id. 534, where the questions involved are definitively settled in that state: *Miller v. The State*, 39 Id. 267; *Hodgson v. Jeffries*, 52 Id. 34; of Iowa: *Wickersham v. Orr*, 9 Iowa, 260; *Beatty v. Gregory*, 17 Id. 114; *Upton v. Brazier*, 17 Id. 157; of Illinois: *Russell v. Hubbard*, 59 Ill. 335, a case of a parol license to use a party wall in the erection of a building; but see *Kamp-house v. Gaffner*, 73 Id. 453; of Georgia: *Sheffield v. Collier*, 3 Kelly, 82; *Mayor v. Franklin*, 12 Ga. 243; *Cook v. Pridgen*, 45 Id. 331; of Nevada: *Lee v. McLeod*, 12 Nev. 280, involving facts very similar to those of the principal case. In the course of the court's opinion, C. J. Hawley says: "The principle that expending money or labor in consequence of a license to divert a water-course, or use a water-power, in a particular way, has the effect of turning such a license into an agreement that will be enforced in equity has been frequently announced by the courts. In all such cases the execution of

the parol license supplies the place of a writing, and takes the case out of the statute of frauds." The Indiana decisions and authorities from Pennsylvania are cited, as well as *Woodbury v. Parshley*, 7 N. H. 237; *Ameriscoggin Bridge v. Bragg*, 11 Id. 108; *Raritan Water-power Co. v. Veghte*, 21 N. J. Eq. (6 C. E. G.) 463; and *Rhodes v. Otis*, 33 Ala. 578. Other states adopting the same principles are New Jersey: *Raritan Water-power Co. v. Veghte*, 21 N. J. Eq. (6 C. E. G.) 463; referring to the earlier case of *Hulme v. Shreve*, 3 Green's Ch. 116, and several English adjudications; Alabama: *Rhodes v. Otis*, 33 Ala. 578; and Ohio: *Wilson v. Chalfant*, 15 Ohio, 248; *Hornback v. Cincinnati R. R. Co.*, 20 Ohio St. 81. There is also an *obiter* opinion of Judge Redfield in *Hall v. Chaffee*, 13 Vt. 157, recognizing that numerous cases hold this view, but inclining in favor of the opposite theory. The New Hampshire cases for many years were disposed to regard a license executed by an expenditure of money, either irrevocable or revocable upon payment of remuneration: *Harris v. Dillingham*, 6 N. H. 9; *Putney v. Day*, Id. 430; *Woodbury v. Parshley*, 7 Id. 237; *Ameriscoggin Bridge v. Bragg*, 11 Id. 102; *Sampson v. Burnside*, 13 Id. 264; *Carleton v. Redington*, 21 Id. 291; *Cowles v. Kidder*, 24 Id. 364; *Miller v. Tobie*, 41 Id. 86. But in *Huston v. Laffee*, 46 N. H. 505, Judge Sargent says that the court thought the more recent decisions sustained the doctrine that the license is in all cases revocable, "so far as it remains unexecuted, or so far as any future enjoyment of the easement is concerned." So, also, *Dodge v. McClintock*, 47 Id. 386. Under this decision the doctrine of equitable estoppel is lost sight of; for it is on the very ground of the execution of the license by expenditures that the future enjoyment thereof is assured to the licensee under the Pennsylvania theory.

Notwithstanding this line of authorities, many of them quite recent, some of the states strongly support a contrary position, and maintain that the reasoning from estoppel overthrows the statute of frauds; that it practically passes an interest in realty without the formalities required by that statute. *Rerick v. Kern* was early examined and denied to be law in New York in *Jamieson v. Milleman*, 3 Duer, 255, 261. The license in that case relied upon to justify the entry upon the plaintiff's premises, was a parol permission to erect an ice-house and smoke-house thereon. After the defendant had made excavations for the foundation of the house, he was forbidden to proceed, but continued the work for some days, until restrained by an injunction. It will be seen that this was not the case of an executed license, but money had been expended on the faith thereof, and the opinion of the court therefore, can not be held dictum. Judge Duer says, that where the effect of holding a license to do something on another's land, irrevocable, would be to give to the licensee a permanent interest or easement in those lands, such license, if not wholly void, is revocable at the pleasure of the grantor and his representatives; and that when such is the character of the license, "even its actual execution is no bar to its subsequent revocation." To the same effect is *Babcock v. Utter*, 1 Keyes, 397. And in *Merrill v. Calkins*, 73 N. Y. 584, the principle is stated, but with an "it seems," which would suggest some doubt as to the law in that state. "The further question, as to the effect of a parol license to occupy the plaintiff's land, followed by the expenditure of money in the construction of the road, need not be considered. The authorities in this state seem to be decisive that the license, if given, operated simply to justify the entry, but was revocable at the pleasure of the plaintiff;" citing *Mumford v. Whitney*, 15 Wend. 381; *Miller v. The Auburn and Syracuse R. R. Co.*, 6 Hill, 61; *Selden v. Del. & Hud. Canal Co.*, 29 N. Y. 639; *Wolfe v. Frost*, 4 Sandf. Ch. 77.

The states which plainly deny that a license can by reason of its execution ripen into an interest in the licensor's realty so as to render it irrevocable, are Connecticut: *Prince v. Case*, 10 Conn. 375, a leading authority for that view of the subject; Maryland: *Hays v. Richardson*, 1 Gill & J., 266; *Long v. Buchanan*, 27 Md. 516; *Partridge v. First Ind. Church*, 39 Id., a curious example of the application of the doctrine to the rights of holders of lots in cemeteries; Rhode Island: *Foster v. Browning*, 4 R. I. 47, an action of trespass, wherein the court intimated that relief might be obtained in equity; Massachusetts: *Stevens v. Stevens*, 11 Metc. 248; *Owen v. Field*, 12 Allen, 457. Judge Cooley examines this question in *Maxwell v. Bay City Bridge Co.*, 41 Mich. 467, and although he states that "the injustice of a revocation after the licensee in reliance upon the license has made large and expensive improvements, is so serious that it seems a reproach to the law that it should fail to provide some adequate protection against it," yet he does not attempt to decide between the authorities, it being unnecessary in the case before him.

From the foregoing review of case law it will be seen that the doctrine of the principal case, though not recognized in some of our state courts, is nevertheless expressive of the law as administered in the majority of them; and that the preponderance of recent judicial opinion is in harmony with the views of Judge Gibson.

All of these decisions determine that the license is a protection to the licensee for acts done in pursuance of it, prior to a revocation, although he may be liable for an injurious use of the premises not contemplated by the license, as bringing sheep with "the scab" on to the licensor's land: *Eaton v. Winne*, 20 Mich. 156. The authorities opposed to the principal case, contend that the license is nothing more than an excuse for what would otherwise be a trespass. Under the rule laid down by the adjudications following *Rerick v. Kern*, it is something more, and under some circumstances will entitle the licensee to relief for an interference with his privilege. The question of relief to be granted the licensee of an executed license is one depending largely on the facts of each case. Some authorities of the New York class admit the injurious consequences that may follow from revoking an executed license. But they say that it is the licensee's lookout not to expend money under a mere permission, which he can not expect to be lasting. This, however, does not seem consonant with justice, and it is certainly not so adjudged in the majority of instances.

Where the licensor sues in trespass, the licensee may in all cases, before revocation, justify under the license. But the license must be specially pleaded: *Chase v. Long*, 44 Ind. 427; *Hamilton v. Windolf*, 36 Md. 301, although, in this citation, the license was said to be admissible under the general issue in mitigation of damages. And even after an attempted revocation, it is apprehended, that the license might be pleaded in bar where it has been accompanied with outlays of money and of labor, in accordance with the reasons of the Pennsylvania doctrine. It is only in equity, however, that complete relief can be given, whether at the suit of the licensor or licensee. If compensation in money can be made to one who has expended money on the faith of a license, such remuneration will be decreed and the license revoked, although executed: *Huff v. McCauley*, 53 Pa. St. 206; *Big Mountain Improvement Co.'s Appeal*, 54 Id. 372. But where expenditures have been made to such an extent that no remuneration other than enjoyment, will be adequate, equity will grant an injunction to prevent a disturbance of that enjoyment: *Big Mountain Improvement Co.'s Appeal*, *supra*. Here the licensor brought ejectment to recover possession of premises on

which a coal yard and other structures had been erected, and on the petition of the licensee, the defendant, an injunction issued. In *Raritan Water-power Co. v. Veghte*, 21 N. J. Eq. (6 O. E. Gr.) 475, this general language is used in regard to relief sought by the licensor. "To the extent that the license is executed, equity will not disturb it or permit its revocation. Where improvements of a permanent nature have been made by a person on his own land, the enjoyment of which depends upon a right recognizable by the law, affecting the land of another, and to which his consent is necessary, and where such consent is expressly proved, or necessarily implied from the circumstances, and the improvements have been made in good faith upon it, equity will not permit advantage to be taken of the form of consent, although not according to the strict mode of the common law, or within the statute of frauds, and to defeat such a purpose, will, upon a proper bill filed, enjoin the licensor from accomplishing his fraud, or when he asks relief it will be refused, or if granted, will be allowed merely in the shape of compensation, but protecting the right of the licensee. To this extent, at least, the doctrine here invoked is sustained by the cases: *Rochdale Canal Co. v. King*, 16 Beav. 630; 8 C., 7 Eng. L. & Eq. 208; *Duke Beaufort v. Patrick*, 17 Beav. 60; *Wood v. Sutcliffe*, 8 Eng. L. & Eq. 217; *Hulme v. Shreve*, 3 Green's Ch. 116; Angell on Water-courses, sec. 318; *Rerick v. Kern*, and note, 2 Am. Lead. Cas. 733; *Wetmore v. White*, 2 N. Y. Cas. in Error, 87; *Jacox v. Clark*, Walker's Ch. (Mich.) 249; *Payne v. Paddock*, Id. 487."

Upon the specific performance of parol licenses, Pomeroy, referring to the Pennsylvania and other decisions, states in his work on Contracts, sec. 132: "In those states, therefore, a parol license to enter upon and occupy land of the licensor, and to do acts thereon, such as constructing a way or water-course, or building a permanent structure even, if partly executed by the licensee, so that injury, which is technically called irreparable, would be caused by its revocation, will be specifically enforced. The nature of the relief will depend upon the nature of the license, and the acts done under it by way of part performance. In general, the actual remedy is an injunction to prevent a revocation, and prevent the licensor from interfering with the occupation and works of the licensee." "But," says the author, "this rule is undoubtedly opposed to the common law doctrine concerning licenses as it prevails in England and in most of the American states." As has been seen, however, the common law rule does not prevail in a majority of the states.

An interesting case was presented to the court in *Branson v. City of Philadelphia*, 47 Pa. St. 329, wherein the plaintiff sought an injunction to restrain the municipality from removing a certain city railroad, with which he had connected his property by a turn-out and track, under a license in writing given to him by the city for a valuable consideration. The doctrine of equitable estoppel was invoked and urged upon the attention of the court as conclusive in the premises. The reply was based upon the extraordinary right of eminent domain, and the petition for an injunction denied. The gist of the opinion is contained in the following language:

"Every licensee from a public authority, whether a municipality exercising a portion of the high power of eminent domain, or the immediate agents or the commonwealth herself, necessarily takes it subject to this right of eminent domain, to be exercised for the benefit of the public in the future as well as in the past. It is one of the fundamental rights of the government, never stationary, but ever keeping step with the march of science, art, and and public improvement. Turnpikes and canals have had their day, attracting to their sides the industry and capital of the citizen, whose improvements and business rose, flourished, and decayed along with their rise, progress,

and decline. But who has ever heard it said that the commonwealth is bound to maintain her works merely because their use has thus built up a business dependent upon them. Unquestionably, actuated by a spirit of benevolence and parental care, which induces her ever to guard the interests of all her children, she will never abandon such a work, unless a greater interest dictates the necessity; and she will often resort to some mode of averting the injuries consequent. But no obligation at law requires her to repair the mere consequences collaterally falling upon those who suffer from the exercise of a great reserved power of acting for the general good: *Monongahela Nav. Co v. Coons*, 6 W. & S. 101; *Henry v. Pittsburgh etc. Bridge Co.*, 8 Id. 85; *Zimmerman v. Union Canal Co.*, 1 Id. 346; *Commonwealth v. Fisher*, 1 Pa. 402; *Case of Philadelphia R. R. Co.*, 6 Whart. 25. 44-45; *Susquehanna Canal Co. v. Wright*, 9 W. & S. 9; *Branson v. City of Philadelphia*, 47 Pa. St. 329, 331.

HUSTON v. MITCHELL.

[14 SERGEANT & RAWLE, 307.]

AN ATTORNEY CAN NOT COMPROMISE a suit by which land shall be taken instead of money; he has authority to do those things only which pertain to the conduct of the suit.

SETTING ASIDE A JUDGMENT entered upon a verdict, without setting aside the verdict, is error.

IN ERROR. Huston recovered a verdict and a judgment against Mitchell for a certain sum of money, the purchase price of a tract of land. At the following term the defendant, upon an order to show cause why the judgment should not be opened, and on argument, the court made an order that the judgment should be opened. The plaintiff then sued out a writ of error, when a stipulation was filed, signed by Thomas Burnside, as Huston's attorney, and H. Williston, as Mitchell's attorney, by which the plaintiff agreed to enter satisfaction of his judgment if defendant would reconvey to him the tract of land which was the consideration of the suit. Upon learning of this agreement Huston appeared in court, moved that it might be vacated, and made affidavit that he had never authorized Burnside to enter into such an arrangement. Burnside also declared that he was not employed by the plaintiff as his attorney, but had acted as a friend of Huston, thinking the compromise would be agreeable to him. It also appeared that Burnside was not the attorney of record.

On a rule to show cause why the cause should not be reinstated and the parties proceed to the argument in the error assigned,

Campbell and Greenough, for the plaintiff in error.

Williston, contra.

By Court, TILGHMAN, C. J. Supposing Mr. Burnside to have been the plaintiff's attorney on record, he would only have been authorized to do such things as pertained to the conducting of the suit. It is said by Chief Justice Marshall, who delivered the opinion of the court in *Holker v. Parker*, 7 Cranch, 452, "that an attorney at law, merely as such, has, strictly speaking, no right to make a compromise," but that he has a right to enter into a reference. The compromise in that case was by the attorneys on both sides, consenting that the referees should make an award for the plaintiff for a certain sum, without any examination of the evidence or accounts of the parties. That compromise fell much more within the general power to conduct the suit than the one now under consideration. There, the suit was for money, and the attorney agreed to take an award for money. But here the object of the plaintiff's suit, which was for the recovery of money, was entirely defeated by an agreement to take land instead of money. I can not conceive how the authority to make such a compromise can be deduced from the general power of an attorney at law. If the plaintiff, on being informed of the agreement, had not immediately disavowed it, I should have thought that his silence would have afforded ground for presumption that he had given power to make it, or was willing to ratify it. But his prompt disavowal leaves no room for such a presumption. If the agreement is set aside the defendant is in no way injured. He is placed exactly in the situation in which he stood before it was made. I am of opinion, therefore, that the agreement should be vacated.

This preliminary point being settled, I will consider the errors which have been assigned on this record. There is but one of any weight, viz., "that the award or judgment of the court below reverses a regular judgment and makes an end of the plaintiff's claim, and amounts to a perpetual injunction, as the verdict is not set aside or affected." It was said by the counsel for the defendant, that the intent of the court was to order a new trial, but the prothonotary made a mistake in entering the order. This is very possible, but we must take the record as we find it. As it stands, it is a simple order that the judgment be opened. I shall give no opinion on the power of the court of common pleas to set aside a verdict and judgment, and order a new trial on a motion not made until the second term after the entry of the judgment. But granting, for the sake of the argument, that they have the power, is the order made in this case legal? I do not think it is, because it does

not amount to a judgment in favor of the defendant, and yet leaves the plaintiff without the means of proceeding in his suit. The verdict is not set aside, though the judgment entered on it is rendered ineffectual. The plaintiff can neither enter judgment on the verdict, nor take out a *venire facias de novo*. This is a situation in which the court had no right to place him. They have made an end of the suit, without showing any ground for so doing. Indeed, one can not help seeing that it could not have been their intent to make an end of it, although by the record, from which we can not depart, it appears that in effect they have done it. I am of opinion that in this there was error, and, therefore, the order to open the judgment should be reversed, and the record remitted, to be further proceeded in according to law.

Order reversed, and record remitted, etc.

Cited in regard to the discretionary power of the court of common pleas to open a judgment in *Cochran v. Eldridge*, 49 Pa. St. 371; *Catlin v. Robinson*, 2 Watts, 380. The principal case is also looked to as an authority that an attorney has no power to compromise his client's claim by taking money instead of land: *Gable v. Hain*, 1 Pa. 267; *Naglee v. Ingersoll*, 7 Pa. St. 196; *Dodds v. Dodds*, 9 Id. 315; and that to set aside such a compromise the client should apply to the court: *Millar v. Criswell*, 3 Pa. St. 451; *Bingham's Trustee v. Guthrie*, 19 Id. 423.

SCOTT v. GALLAGHER.

[14 SERGEANT & RAWLE, 333.]

A BONA FIDE PURCHASER of the legal title is not affected by a secret trust, of which he has not direct, express and positive notice.

THE POSSESSION OF A CESTUI QUE TRUST exercising all the acts of ownership, is not such notice.

THE POSSESSION OF A CESTUI QUE TRUST becomes adverse when the legal title is conveyed in violation of the trust.

WRIT of error. The opinion states the case.

By Court, ROGERS, J. This was an action of ejectment, brought the fourteenth of March, 1825, to the April term, by James Scott against Robert C. Gallagher and James Howell, to recover the possession of one hundred acres of land. The title to the premises was regularly deduced to a certain Thomas Gallagher, under whom the plaintiff and defendants claim title. Thomas Gallagher and wife, on the twenty-first of November, 1786, by a deed absolute on its face, and purporting to be for a

valuable consideration, conveyed the premises to Duncan McCormick. The deed was regularly acknowledged and recorded. Duncan McCormick, on the twenty-ninth of November, 1786, eight days after the above transaction, executed a bond to Thomas Gallagher, the condition of which was: "That Duncan McCormick should sell the above described tract of land in the city of Philadelphia, and should make a true return of the value thereof, either in money or shop goods, after his return from Philadelphia, on the first of February, next succeeding; that if he should be unable to sell the lands, then he would return to Thomas Gallagher the conveyance and original deeds delivered by Gallagher to McCormick." The property was not to be sold for less than one hundred pounds cash, or one hundred and thirty pounds in store goods. Duncan McCormick went to Philadelphia, but never returned to Mifflin county, and did not sell the property, nor did he ever reconvey or return the conveyance or original deeds to Thomas Gallagher; nor does it appear that any measures were taken by Gallagher to compel him so to do. The possession of the property was not transferred by Gallagher to McCormick, nor did the purposes of the trust make it necessary that the possession should be transferred; on the contrary, it does appear that Thomas Gallagher resided on an adjoining tract; that he cleared some land in this tract; that a house was built on the property, and that he, Gallagher, and those claiming under him, have been in the continued possession of the property, exercising every act of ownership over it, until the commencement of this suit. Matters remained in this situation until the eleventh of August, 1788, when, by his last will and testament of that date, Duncan McCormick "gave and bequeathed to Richard Butler and wife, whom he appoints his heirs, all his property and estate." On the fifteenth of December, 1789, Richard Butler and wife, for the consideration of one hundred pounds, conveyed the property to John Rittenhouse. This deed was regularly acknowledged, but not recorded until the eleventh of November, 1814. On the twelfth of July, 1790, John Rittenhouse conveys to Elizabeth Rittenhouse, whose heirs (Elizabeth having died), for the consideration of one hundred and forty-two dollars, convey the property in dispute to James Scott, a citizen of New Jersey, and the plaintiff in this suit.

It is conceded that unless Scott had notice of the secret agreement between Gallagher and McCormick, he cannot be affected by it; but it is contended that the circumstances above stated amount to notice to him and the whole world, that he, Thomas

Gallagher, and those claiming under him, were the owners of the equitable interest in the land. Courts of justice view secret agreements with a jealous and scrutinizing eye. The owner of the legal title should have direct, express and positive notice, otherwise he takes the property discharged of the trust which existed between the original parties. There would be no hardship in the case on Gallagher, because it was his own folly to place himself and others in the power of McCormick. If any person suffers, it should be Gallagher, and not Scott, for this plain and obvious reason, that he has been the cause of the loss sustained. Equity says, if one of two innocent persons must suffer, he who has been the cause shall bear the loss. Had, then, Scott such a notice of this agreement as to affect him? It is said that he had, because Gallagher continued in possession and received the rents and profits of the property until the commencement of this suit. How this can be notice of a secret agreement between Gallagher and McCormick, I am at a loss to conceive. Scott, who lived in the state of New Jersey, looked only to the deed in fee-simple, given by Gallagher to McCormick, regularly recorded, and which never was divested by a deed of reconveyance from McCormick. He is not bound to call on the person who is in the possession of the land to inquire of him whether he has a secret agreement with the owner of the legal title. If there be an agreement, it is the duty of the tenant in possession to spread it upon the records of the county, in order to prevent innocent purchasers from being deceived. A. sells a tract of land to B., and retains the possession; B. sells to C.; C. is not bound to call on A. to know whether there is not a secret agreement adverse to the deed from A. to B. between them. He would be bound only by those agreements which are consistent with his deed, such as a retention of the possession or payment of rent. In this case it does not appear that Gallagher ever took any steps whatever to obtain a reconveyance of the land, or a surrender of the deeds placed in the hands of McCormick. He rests merely upon his possession, without having given any notice whatever of the real nature of the transaction between him and McCormick, or making any application to the court for a rule on McCormick to compel him to reconvey and redeliver the deed placed in his hands. If we had a court of chancery, Gallagher's duty would have been perfectly plain. It would have been incumbent upon him, instead of resting on his possession, merely to have applied to have a conveyance of the land, and a return of the deeds. If this had been neglected

by him, he could have appeared with a bad grace in a court of justice, in a dispute with a *bona fide* purchaser, without express notice of the secret agreement between him and McCormick. But it may be said that the courts have no such power in Pennsylvania. If they have not, of which I am by no means satisfied, it shows a most obvious and glaring defect in our laws. Until the point is fairly brought before me, I am not to be understood as expressing any opinion, although I confess the inclination of my mind is that the courts have the power of administering relief, and that in cases which I can readily suppose, it would be a dereliction of duty not to exercise it so as to do exact and equal justice between the parties. In this case, however, has Gallagher done all he could or ought to have done? Has he given any notice of the secret agreement? Has he commenced trover or detinue to recover the papers from McCormick, or an action on the case, to recover damages for the non-performance of the agreement? He has rested on his possession, and the consequence has been that the land has been purchased by James Scott, who resided in the state of New Jersey, from the person who was the owner of the legal title to the land, without any express notice of the secret agreement between him and McCormick. Inasmuch then as it does not appear that Scott had express notice of the agreement, I am of opinion, if there were nothing else in the case, Scott would be entitled to recover.

The defendants, however, further rely on the act of limitations. In the case of *Pipher v. Lodge*, 4 Serg. & R. 315, the chief justice lays down this principle, that while the possession can be reasonably supposed to be in accordance with the trust, it should be construed for the benefit of the *cestui que trust*, and consequently the act of limitations would have no operation. This principle applies to the period which elapsed from the time of the conveyance to McCormick, until the object of the trust was effected, or, at any rate, until the first of February, 1787. Until that time the possession of Thomas Gallagher was consistent with the agreement. It was not adverse, and consequently, in the language of the chief justice, the act of limitations would have no operation. Indeed, it appears to have been the manifest intent of the parties that the possession should be surrendered only to a *bona fide* purchaser from McCormick. Duncan McCormick sold the property; nor is it clear to me that he ever intended to bequeath it. Charity would say he did not, for a contrary supposition would make

him sin in his grave. It would be a gross fraud on Gallagher. On the fifteenth of December, 1789, Butler and wife, who, the plaintiffs say, were the devisees of Duncan McCormick, convey this property to John Rittenhouse. Can then, from this period, the possession of Thomas Gallagher be reasonably supposed to be in accordance with the trust? In the same case of *Pipher v. Lodge*, 4 Serg. & R. 570, Justice Gibson says, in the case of an express trust, a good reason always appears upon the face of the trust itself, why the *cestui que trust* should not call for the possession, and therefore no laches is imputable to him; but when he is entitled to the possession, and neglects to call for it, and can assign no reason why he did neglect, the case is very different. I should hold the possession adverse from the moment he was bound to execute the deed and surrender the possession. Here in this case I hold the possession adverse from the time Butler and his wife executed the deed to John Rittenhouse. At that time they had a right of entry, which they have neglected to enforce for nearly twenty-six years, without giving any reason for their neglect. This case, indeed, presents the singular spectacle of a man exercising every act of ownership on the land, for a space of nearly twenty-six years, without any steps being taken to enforce the adverse right, or indeed any intimation, so far as we know, that any such claim existed. On the latter ground, that of the act of limitations, I am of opinion the plaintiffs are not entitled to recover.

It will be observed that I express no opinion of what the law would be on the agreement, even if Scott had express notice of the agreement. It would be a matter well worthy of consideration, the act of limitations being out of the question, whether the agreement could affect Scott's title; or in other words, whether Gallagher's heirs would not be entitled to the money, and not the land.

Judgment affirmed.

Subsequent decisions of Pennsylvania, referring to *Scott v. Gallagher*, are *Yocom v. Morris*, 3 Phila. 414; *Juvenal v. Patterson*, 10 Pa. St. 283; *Hood v. Fahnestock*, 1 Id. 477; *Bracken v. Miller*, 4 W. & S. 107, in each of which the principle is recognized as sound that the possession of a *cestui que trust*, and the exercise by him of acts of ownership, are not constructive notice to a purchaser of the legal title from the trustee. Upon the same proposition this case is cited in *Flagg v. Mann*, 2 Sumn. 515, and also, in *Bentley v. Phelps*, 2 W. & M. 446; and *Tufts v. Tufts*, 3 Id. 515.

The doctrine of the principal case is repudiated in *Pell v. McElroy*, 36 Cal. 268, 276. Judge Sprague, speaking for the court, says: "In the case of *Scott v. Gallagher*, 14 Serg. & R. 433, relied upon by appellants, the reasoning

of the learned judge who delivered the opinion of the court was directed to the question as to whether possession *per se* was notice to a subsequent purchaser of the interest of the occupant, and applies to all parties in possession indiscriminately, whether strangers to or directly connected with the title, as evidenced by the deed relied upon by the purchaser. We are unable to appreciate the force of the reasoning, and unwilling to adopt the conclusions therefrom, announced in that case. Can a party be regarded as a purchaser in good faith, when he has notice of a fact inconsistent with the legal effect of his vendor's title, and fails to seek an explanation of such inconsistent fact from the source most likely to afford it? We prefer to adopt the rational doctrine, announced by Mr. Justice Selden, in delivering the opinion of the court in the case of *Williamson v. Brown*, 15 N. Y. 355. Says that learned judge: 'The true doctrine on this subject is, that when a purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim, to be considered as a *bona fide* purchaser.' "

CONSTRUCTIVE NOTICE ARISING FROM POSSESSION.—See *Knox v. Thompson*, 13 Am. Dec. 246, and note.

GARDNER v. FERREE.

[15 SERGEANT & RAWLE, 28.]

DISCHARGE OF SURETY.—A request made by the widow of a surety five months after the latter's death, to the obligee of a bond, to sue the principal, will not discharge the administrator of such surety.

THE SURETY, OR, AFTER HIS DEATH, HIS PERSONAL REPRESENTATIVE ALONE, can request the obligee to sue the principal; and the obligee may treat the request of the widow as that of a mere stranger.

EXTENT OF OBLIGEE'S DUTY.—The obligee is bound to do no more than permit the surety to manage the legal responsibilities of the parties, so as to cast the burden where it ought to be borne; and if, when requested to sue, he offers the bond to be sued on, the surety who refuses such offer will not be discharged.

ERROR to the common pleas of Adams county. Action on a bond. Ferree brought this suit against Jacob Gardner and John Wiseman, administrators of Martin Gardner, deceased, on a joint and several bond given by Jacob Gardner and William Gardner; and a verdict was given for the plaintiff below.

A short time before his death Martin Gardner said his estate should not pay the bond, as he was only bail, and that payment could then be had from William Gardner, the principal. Some time after the death of Martin, his widow called upon Ferree, and told him that her husband had said that he must push William Gardner for payment, for it could be got from him then; and if he did not do so, Martin's estate would not

be liable, as he was only bail. Ferree told her he could not then sue, but offered her the bond, and told her to sue, which offer she refused. Suit was afterwards brought, and judgment had, but no *fiery facias* issued. On a judgment obtained the following year by another creditor against William Gardner, a *fiery facias* issued, and the money was made. There was evidence to show that William Gardner had his personal property about him until it was sold in the last mentioned suit.

Stephens, for the plaintiffs in error. The direction of a surety on his death-bed to his wife, to request the obligee to sue, could not, if executed by her, discharge the bail. The authority of the wife to demand that suit be brought was not revoked by the husband's death.

Carothers, for the defendant in error. The offer to allow the wife to bring suit on the bond rebutted any claim to a particular equity. The wife's authority terminated on the death of the husband. The whole matter was under the control of the administrators, when the request was made by the widow, and they were the only persons to whose requisitions the obligee was bound to attend. Besides, there was an interval of at least five months between the death of Gardner and the request made by the widow.

By Court, Gibson, J. Courts of equity have gone to an extreme in favor of sureties, often granting relief for a constructive equity, the existence of which the surety himself did not even suspect. I would be unwilling in cases of this sort to go beyond the rule in *Cope v. Smith*, 8 Serg. & R. 110, that the surety shall be exonerated only where the obligee has refused to bring suit, or, what I take to be the same thing, to suffer the surety to do it in his name, after a positive request and explicit declaration by the surety that he would otherwise hold himself discharged. The reporter has added a query, whether the surety would be discharged, if it should appear that the insolvency of the principal would have prevented the money from being obtained, if suit had been brought when required. Surely not. A surety is liable at law, and when he comes into equity, he ought to show a substantial ground of relief, actual injury, and not a mere possibility of injury from the negligence of the obligee, for an equity can arise from nothing less.

A constructive injury can give rise only to a constructive equity, which is insufficient to discharge an obligation arising from one of the most solemn acts known to the law. He surely

ought not to be exonerated, because the obligee did not choose to indulge him in an experiment that would have produced no consequences. He ought to show that his request was reasonable, and that he was deprived of what was not merely a speculative benefit. In the court below no difficulty was made as to this, and we are to suppose that the money might have been obtained from the principal. But it appeared the surety had declared on his death-bed that his estate should not be liable for this debt, as he was only a surety, and the money might be had of the principal; that some time after his death, how long is not stated in the record, but it is agreed to have been about five months, his widow informed the obligee, that her husband had said, "he must push William Gardner," the principal, for that the money could be got from him then, and that if he did not, the estate of her husband, who was only a surety, would be exonerated; and that the obligee refused to do so then, but offered her the bond with permission to sue in his name, which she declined. I intimate no opinion of the court, whether such a request made immediately after the husband's death, but before the widow had administered, would carry with it the authority which the husband had over the subject-matter in his life-time. For myself, I say it would not. A man can exercise a control over his estate, after his death, only by the instrumentality of a testamentary direction, which this was not; and the instant, therefore, that the surety died, the right to stir in the matter devolved on his personal representatives. If a case should occur, in which it would be necessary to act before administration could be obtained, the interest of the widow in behalf of herself and her children, would be a sufficient authority; but she is entitled to administration instantly. Certainly she would have no authority, after administration granted to another. I am, therefore, of opinion the obligee might consider her as a stranger. But I have the authority of the whole court in saying, that under the circumstances of the case, the request came too late; and that at so distant a period, the obligee might disregard the request of any one but the legal representative. And, besides, the offer to permit the widow to use the bond in any way she might think beneficial to her husband's estate, would effectually rebut any equity that might otherwise have arisen. If she be considered competent to act in the matter at all, she must be considered so for every purpose. Now, what more can be required than to invest the surety with means in the power of the obligee. The surety

does not stand on the ground of a legal advantage, but the obligee does, and he is not bound to do a single act to assist the surety, when the surety can help himself; it being his duty only to permit the surety to manage the legal responsibilities of the parties, so as to cast the burden where it ought to be borne. The offer of the plaintiff, therefore, furnished a decisive objection to the equity set up; and waiving other considerations, the plaintiff was on that ground entitled to recover.

TILGHMAN, C. J., being indisposed, did not sit.

Judgment affirmed.

Cited, approved and followed by the court in *Erie Bank v. Gibson*, 1 Watts, 147; also cited in *Harvey v. Turner*, 4 Rawle, 234; *Greenawalt v. Kreider*, 3 Pa. St. 267; *Stark v. Fuller*, 42 Id. 323; and in *Higerty v. Higerty*, 1 Phila. 233, in support of the rule that a surety, in order to discharge himself from liability by requesting the creditor to sue the principal, must accompany such request with an explicit declaration that, unless suit is brought, he will consider himself discharged.

DISCHARGE OF SURETY.—*Pain v. Packard*, 7 Am. Dec. 369, and note 370; *King v. Baldwin*, 8 Id. 415, and note 424; *Hayes v. Ward*, Id. 554; *Cope v. Smith*, 11 Id. 582, and note 589; *Hunt v. Bridgham*, 13 Id. 458.

BARNET v. BARNET.

[15 SERGEANT & RAWLE, 72.]

THE RECORD OF A RECOVERY BY THE WIFE, IN AN ACTION OF COVENANT against the executors of the husband is not admissible in evidence under the plea of release of dower in an action of dower brought by her.

DEFECTIVE ACKNOWLEDGMENT OF DEED BY A MARRIED WOMAN.—Where it does not appear from the certificate of acknowledgment of a deed by a married woman that the contents of the deed were made known to her by the officer taking the acknowledgment, or that she did in fact know them, her acknowledgment is incurably defective, and does not bar her dower.

ACTS PASSED TO CURE DEFECTS IN ACKNOWLEDGMENT of deeds by married women are constitutional; but such acts do not affect judgments rendered prior to their passage.

PAROL EVIDENCE IS INADMISSIBLE TO SUPPLY DEFECTS in a certificate of acknowledgment, except in cases of fraud, collusion or forgery.

EVIDENCE OF THE ANNUAL VALUE OF LAND of which the husband did not die seised is not admissible in an action of dower.

ERROR to the common pleas of Perry county. Dower. The opinion states the case.

Alexander, for the plaintiff in error.

Carothers, for the defendant in error.

By Court, **TILGHMAN, C. J.** This was an action of dower brought by Margaret Barnet, widow of Thomas Barnet, against Frederick Barnet, the plaintiff in error. The defendant pleaded a release of dower by the plaintiff, who replied that she had not given a release, and on this issue was joined.

The first error assigned is in the rejection of a record offered in evidence by the defendant, in an action of covenant brought by the demandant against the executors of her late husband, on certain articles of agreement executed previous to their marriage, by which the husband covenanted that in case he and his intended wife should live together ten years, he would pay her four hundred dollars. In this action damages were recovered for breach of Thomas Barnet's covenant in not paying the four hundred dollars. This evidence was rightly rejected for several reasons. It had no relation to the issue joined, viz., release of dower, or no release by the demandant. It did not purport to be a release, nor had it any resemblance to one, nor did it contain any agreement on the part of the demandant to accept the four hundred dollars in satisfaction of dower. If the husband had died within the ten years, and his wife had survived him, she would have taken no money by this agreement, and thus according to the construction contended for by the defendant, she would have lost both dower and money. There was no error, therefore, in rejecting this evidence.

The second error is the opinion given by the court, that the acknowledgment of a deed from Thomas Barnet, deceased, and his wife, the demandant, for the conveyance of the land in which dower is now claimed, was defective so far as concerned the wife, and not sufficient to bar her of her dower. It does not appear by the certificate of this acknowledgment that the contents of the deed were made known to the wife, by the justice who took her acknowledgment, or that she did, in fact, know them. It has been expressly decided by this court that this is an incurable defect, and, therefore, the opinion of the court below was right. Since the judgment in this case in the court of common pleas, an act of assembly has been passed for curing defects in the acknowledgment of deeds by married women. Had this act been passed before the judgment below, it would have cured the defect above mentioned in the demandant's acknowledgment, and there would have been error in the court's opinion. It is our unanimous opinion that there is nothing unconstitutional in this act of assembly, but it is also our unanimous opinion that it does not extend, by retrospect, to render a judgment erroneous which

was entered before its passage. The question now to be decided is, whether there was error in the judgment below at the time it was rendered, and we are of opinion there was not.

The third error assigned is in the rejection of parol evidence offered by the defendant, to prove that when the demandant made her acknowledgment, she knew the contents of the deed, and received eight dollars from Frederick Barnet for executing the deed; that such evidence was inadmissible, was decided by this court in the case of *Watson v. Bailey* [2 Am. Dec. 462]. There may be cases of gross fraud, in which parol evidence would be received, unless the land had passed into the hands of a purchaser for valuable consideration, without notice of the fraud. I have known two cases of forged deeds, where the justice who took the acknowledgment was imposed on by a person who assumed the name of the supposed grantor. There parol evidence was received, and so I think it would be admissible to prove collusion between the husband and the justice, in consequence of which it was falsely certified that the wife had appeared and made an acknowledgment, such as is required by law; but there was nothing like fraud in the evidence offered by the defendant. Its object was to prove that the certificate of the justice did not contain the whole truth, and comes exactly within the principle of *Watson v. Bailey*.

The fourth and last error is in the rejection of evidence offered by the defendant, to prove the annual value of the land. This evidence was improper. The demandant claimed no damages, because her husband did not die seised. For what purpose, then, was the annual value to be inquired into? When the demandant takes out a writ of seisin, she will be entitled to one third, according to the value of the land at the time it was aliened by her husband. The inquest must see to that, and the court has sufficient control over their proceedings to protect the defendant from wrong.

It is the opinion of the court that the judgment should be affirmed, and the record is to be remitted to the court of common pleas, in order that such further proceedings may be had as are agreeable to law.

Judgment affirmed.

CONSTITUTIONALITY OF ACTS VALIDATING CONTRACTS AND DEEDS OF MARRIED WOMEN.—Although retrospective statutes are, in general, regarded as unconstitutional, yet when they are remedial in their nature, when they do not disturb vested rights, or impair the obligation of contracts, and go only to confirm rights already existing, by curing defects of execution and giving

the means of enforcing existing obligations, such statutes have been sustained when they are "clearly just and reasonable, and conducive to the general welfare:" 1 Kent's Com. 455; *Hepburn v. Curtis*, 7 Watts, 300; *State v. Newark*, 3 Dutch. 185; *Chesnut v. Shane's Lessee*, 16 Ohio, 599; *Foster v. The Essex Bank*, 16 Mass. 245; *Clarke v. McCreary*, 20 Miss. 347; *Tate v. Stooltzfoos*, 16 Serg. & R. 35, *post*; *Goshen v. Stonington*, 4 Conn. 209; S. C., 10 Am. Dec. 121; *Dairs v. The State Bank*, 7 Ind. 316; *Savings Bank v. Allen*, 28 Conn. 97; *Bridgeport v. Hubbell*, 5 Id. 237; *Mather v. Chapman*, 6 Id. 55; *Norton v. Pettibone*, 7 Id. 319; *Savings Bank v. Bates*, 8 Id. 505. "On the same principle legislative acts validating invalid contracts have been sustained. When these acts go no farther than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, the question which they suggest is one of policy and not of constitutional power:" Cooley on. Const. Lim., 374; *Grim v. Weissenberg*, 57 Pa. St. 433; *Woodruff v. Scruggs*, 27 Ark. 26.

Accordingly it has been held that acts passed for the purpose of curing defects in the acknowledgments of deeds by married women are constitutional, although they extend to deeds acknowledged previous to their passage: *Chesnut v. Shane's Lessee*, 16 Ohio, 599; *Mercer v. Watson*, 1 Watts, 330; *Watson v. Mercer*, 8 Pet. 88; *Satterlee v. Matthewson*, 2 Id. 380; *Tate v. Stooltzfoos*, 16 Serg. & R. 35, *post*; *Underwood v. Lilly*, 10 Id. 101; *Dulany v. Tilghman*, 6 Gill & J. 461; *Lycoming v. Union*, 15 Pa. St. 171. So acts have been sustained that validated deeds and other contracts of married women, which were imperfectly executed under the law as it existed at the time when they were made: *Goshorn v. Purcell*, 11 Ohio St. 641; *Dentzel v. Waldie*, 30 Cal. 139. In the latter case the court said: "The act in question does not divest the plaintiff of her title to the land in controversy. On the contrary, it gives effect to the contract made by her fairly and in good faith, by which she intended but failed to pass the title to another merely because the proper legal forms were not observed. The same will which prescribed those forms has said that a non-compliance therewith shall be waived or excused, and the act held valid notwithstanding, and we find no constitutional impediment in the way." In *Watson v. Mercer*, 8 Pet. 88, the court, after discussing the constitutionality of the act under consideration, expressed the following as its opinion: "So far, then, as it has any legal operation, it goes to confirm, and not to impair the contracts of the *femes-covert*. It gives the very effect to their acts and contracts which they intended to give, and which, from mistake or accident, has not been effected."

The constitutionality of this class of acts has been constantly assailed on the ground that they interfere with vested rights: *Lycoming v. Union Bank*, 15 Pa. St. 171; *Lane v. Nelson*, 79 Id. 407; *Tate v. Stooltzfoos*, 16 Serg. & R. 35, *post*. In answering this objection, Duncan, J., in delivering the opinion of the court in the case last cited, says: "I will just add that it is an abuse of terms to contend that this is an act divesting vested rights. Such acts would be odious and unjust, as well as unconstitutional; for it is not intended by a vested right that it shall be a right to do wrong; to take advantage of a mere slip in form, where the transaction is a *bona fide* one; and to avoid an honest conveyance, fairly acknowledged, in the hands of an innocent purchaser." It is not an easy matter to determine from the decisions what are vested rights: See note to *Goshen v. Stonington*, 10 Am. Dec. 134, and cases there cited. Courts do not regard retrospective statutes

of any kind with favor. In *Journey v. Gibson*, 56 Pa. St. 57, the court said. "Such legislative acts are sustainable only because they are supposed not to operate upon the deed or contract changing it, but upon the mode of proof. It must be admitted that they often produce very harsh results:" 1 Kent's Com. 455, 456; Smith's Com. on Stat. and Const. Law, sec. 267; Sedgwick on Stat. and Const. Law, 193; *Hedger v. Rennaker*, 3 Metc. (Ky.) 255. Courts will not construe statutes as intended to have retrospective operation, unless such intention is clearly manifested by the terms of the statutes themselves: *Briggs v. Hubbard*, 19 Vt. 86. The invalid contract which a statute can validate must be one that the parties could lawfully enter into at the time it was made, which would have been valid except for some defect in its execution, and which did not interfere with any vested right. "Perhaps the true limit of the curative power of the legislature, as gathered from all the authorities and sanctioned by principle, is, or ought to be, that it can reach things voidable only, not void; defects of execution only, not of authority or jurisdiction:" *Kimball v. Rosendale*, 42 Wis. 407; *Grove v. Tod*, 41 Md. 633; *Meighen v. Strong*, 6 Minn. 177; *Orton v. Norman*, 23 Wis. 102; *Routson v. Wolf*, 35 Mo. 174; *Alabama Life Ins. Co. v. Boykin*, 38 Ala. 510; *Russell v. Rumsey*, 35 Ill. 362; *Tilton v. Swift*, 40 Iowa, 78; *Bennett v. Fisher*, 26 Id. 497; *Boston v. Cummings*, 16 Ga. 102; *Commissioners of Sedgwick Co. v. Bunker*, 16 Kan. 498. And "the operation of these cases must be carefully restricted to the parties to the original contract, and to such other persons as may have succeeded to their rights with no greater equities:" Cooley on Const. Lim. 378; *Brinton v. Seevers*, 12 Iowa, 389; *Thompson v. Morgan*, 6 Minn. 292; *Meighen v. Strong*, Id. 177; *Garnett v. Stockton*, 7 Humph. 84.

On the question of the constitutionality of acts validating defective acknowledgments of deeds, the principal case is cited with approval in *Mercer v. Watson*, 1 Watts, 356; *Lycoming v. Union*, 15 Pa. St. 171; *Shoenberger v. The School Directors*, 32 Id. 37; *Shonk v. Brown*, 61 Id. 327; *Weister v. Hade*, 52 Id. 480; *Watson v. Mercer*, 8 Pet. 109; *Dentzel v. Waldie*, 30 Cal. 144. Bellows, J., in *Rich v. Flanders*, 39 N. H. 304, says the doctrine of *Barnet v. Barnet*, is contrary to that held by the courts of New Hampshire. "To the point that parol evidence is not admitted to prove that the certificate did not contain the whole truth, it is cited in *Jamison v. Jamison*, 3 Whart. 469; that parol evidence may be received for the purpose of proving forgery, fraud, or collusion, in *Louden v. Blythe*, 16 Pa. St. 541; that the demandant is entitled to one third only of the value of the land at the time of the alienation by the husband, where the latter did not die seised, in *Benner v. Evans*, 3 Pa. 456.

PAROL EVIDENCE TO VARY CERTIFICATE OF ACKNOWLEDGMENT: *Smith v. Ward*, 1 Am. Dec. 80, and note; *Watson's Lessee v. Bailey*, 2 Id. 462; *Jourdan v. Jourdan*, 11 Id. 720.

DOUGHERTY v. SNYDER.

[15 SERGEANT & RAWLE, 84.]

A CONTRACT BETWEEN HUSBAND AND WIFE, MADE IN LOUISIANA, and valid by its laws, will be enforced in Pennsylvania against the husband's executors.

LAW OF FOREIGN COUNTRY, HOW PROVED.—The unwritten law of a foreign country may be proved by the testimony of persons learned in the laws

of such country; and foreign laws, if not shown to be in writing, may be proved in like manner.

AN EXECUTOR WHO VOLUNTARILY PAYS LEGACIES within the year, without taking a refunding bond, is guilty of a *devastavit*.

DOMICILE OF WIFE.—A wife cannot be a citizen of a state different from that in which her husband resides, so as to enable her to sue in the United States courts.

A WIFE CAN NOT, IN GENERAL, SUE HER HUSBAND in Pennsylvania. She has, therefore, six years from his death, within which to bring suit against his executors.

THE RIGHT OF A FEME-COVERT, TO SUE HER HUSBAND, is merely suspended during the coverture, but is not destroyed. She may therefore sue his executors after his death.

THE case was tried at *nisi prius* before Duncan, J., and a verdict given in favor of the plaintiff for nine thousand five hundred dollars, and the jury found assets in the hands of the defendants, amounting to five thousand one hundred and twenty dollars. The defendant now obtained a rule to show cause why a new trial should not be granted, and filed the following reasons: 1. Because the plaintiff was permitted to prove by parol the law of Louisiana in 1791, then a Spanish province, in relation to contracts made between husband and wife, without first showing such law to be unwritten law; 2. Because plaintiff was permitted to prove the written law of Louisiana in 1791, in reference to such contracts, by parol testimony; 3. Because the judge charged the jury that no length of time whatever was sufficient in this case to raise a presumption of payment, for the time would not begin to run during the plaintiff's coverture, and the suit was brought within six years after discoveriture; 4. Because it appears from evidence discovered since the trial that the sum lent was only fifteen hundred dollars, and not seven thousand dollars; 5. Because from the letters of the plaintiff to the executor before he paid the legacies he was not guilty of a *devastavit* in making the payments; 6. Because the jury allowed six per cent. interest when the legal rate in Louisiana is five per cent.; 7. Because the plaintiff never having resided out of Louisiana since her marriage, and her husband never having resided in Louisiana since 1791, she had the right to sue him in his life-time, notwithstanding the coverture, and is, therefore, barred by the statute of limitations; 8. Because the plaintiff can not maintain this action against executors.

The other facts are stated in the opinion.

Purdon and Chauncey, for the defendant.

Duponceau, for the plaintiff.

By Court, DUNCAN, J. This is a brief outline of the cause of action. The plaintiff, a widow lady, resident in New Orleans, possessed of considerable real and personal estate, intermarried in 1791, with George Dougherty, the testator, a man then in rather indigent circumstances. He cohabited with her a few months, and in September, 1791, obtained from her seven thousand dollars, for which he gave her the following instrument of writing:

“Je soussigné, en présence de temoins, reconnois avoir reçu de ma femme la somme de sept mille piastres, qu'elle me confie pour aller faire une pacotille à Philadelphie, et revenir de suite, ayant chargé la dite somme de sept mille piastres à bord du balaou, Espagnol, le Saint Joseph, Capitaine Bodos, sur lequel balaou je suis passager. Je lui donne la presente reconnoissance comme étant sa propriété, afin qu'elle puisse reclamer la dite somme de sept mille piastres du capitaine ou de mes parents à Philadelphie, en cas que je viendrais à mourir, à Dieu me plaise. A la Nouvelle Orleans, le 26 Septembre, 1791. George Dougherty.

“Jn. Dupuy, F. Pacquetet.”

Translation: “I, the underwritten, in the presence of witnesses, acknowledge to have received of my wife the sum of seven thousand dollars, which she intrusts me to go and purchase an adventure at Philadelphia, and return immediately, having shipped the said sum of seven thousand dollars on board the Spanish schooner St. Joseph, Captain Bodos, in which schooner I am a passenger. I give her the present acknowledgment, as being her property, in order that she may claim the said sum of seven thousand dollars of the captain or of my relations at Philadelphia, in case I should happen to die, which God forbid. New Orleans, twenty-sixth September, 1791. George Dougherty.

“Jn. Dupuy, F. Pacquetet.”

He, immediately after this, sailed for the United States, and came to Philadelphia, where he resided until his death, in 1820. He made a will by which he bequeathed to his wife one third part of the rents and profits of his real estate, and the residue of his estate he gave to his sisters. Some time after, but within a year after his death, the plaintiff brought this action to recover the seven thousand dollars. It did not appear that after he left New Orleans, he had any communication or correspondence with his wife; for in his will, he states he does not know

whether she is alive or dead. Taking into view the substance of the counts in the declaration, it was an *assumpsit* for money lent to the husband by the wife in the common form, and for money advanced to him to be paid on his death. The plaintiff claims the original sum, with interest from the commencement of the action. Besides the proof by the written document, the plaintiff proved the advance of this money by the deposition of two witnesses. The defendant pleaded *non-assumpsit* and *non-assumpsit infra sex annos*, and payment. To the plea of the statute of limitations the plaintiff replied that she was beyond sea, and a *feme-covert*. Rejoinder that she was not beyond sea; that she was the wife of George Dougherty at the time the money was received, and continued such until his death. It was agreed that the defendant should have the full benefit of all objections to this plea of coverture, as if he had specially demurred. There was a plea of deficiency of assets. The plaintiff offered to prove by a witness, William Canonge, an advocate of Louisiana, stating his knowledge of the law of Louisiana, before and after its cession to the United States, in the year 1791, and generally when that colony was under the dominion of the king of Spain, and who is likewise conversant in the laws which have been enacted under the territorial and state government, that by such writing the wife might legally contract with her husband for such property as she held in her paraphernal right; and that all her property was paraphernal, except that which was settled by marriage contract, which was dotal. That by those laws she could lend it or let him have the use of it. That there was nothing in the Spanish laws in any way to invalidate such contracts, but on the contrary, they were valid, and that as well by the old Spanish laws as by the laws now in force, the wife had at the time of the dissolution of the marriage an action against the husband or his heirs, for the restitution of all the property which she brought in marriage, either dotal or paraphernal, and which the husband may have had the use of, and that to that effect the law raises and gives to the wife, or her heirs, a mortgage on the property of her husband.

This evidence was objected to on the ground that it was to prove the laws of a foreign country by parol. No allegation was then made that the law was founded on written edicts or that it was other than the unwritten law of the country. I admitted the evidence, reserving the points, and the first matter to be decided is, whether this was competent evidence. Our courts

are not bound to notice the laws of Spain. The way of proving foreign laws, is by admitting them to be proved as facts, and the court must assist the jury in ascertaining what the fact is: *Mostyn v Fabrigas*, 1 Cowp. 145. The unwritten laws must be proved by the testimony of persons acquainted with them, by public history, or by cases decided. But an edict registered must be proved by a copy under the national seal, or by a sworn copy collated by a witness, and in this, as well as in every other case of trial of fact, the best evidence which the nature of the case will admit of must be produced; that is, the evidence in the power of the party producing it. This rule of evidence applies to foreign laws, as it does to the other facts: *Church v. Hubbard*, 2 Cranch, 236. Thus, one may prove by parol a contract, but if it be shown to be in writing, the writing must be produced. When this evidence was received, there was not a suggestion, much less any proof, that the law stated by Mr. Canonge was other than the unwritten law of the country. These laws are generally difficult of proof. It would be a very expensive matter to prove them by copies authenticated. It, therefore, shall reasonably fall on the party objecting to the parol proof to show that the law was a written edict of the country. Reason and public convenience, the just administration of the law, require this. We need not go abroad and look for decisions in other countries, for it was decided in the highest court in our own country, in *Livingston v. Maryland Ins. Co.*, 6 Cranch, 274, that if foreign laws are not proved to have been in writing, public edicts, they may be proved by parol. There can be no difference whether it be a law regulating trade, or a law on any other subject; the rule, from its nature, is universal. It is, therefore, the opinion of the court that this evidence was properly admitted.

This disposes of the first and second reasons assigned as causes for a new trial. But if the defendant now had shown a written law of Spain, an edict different from the law as stated by Mr. Canonge's deposition, which proved that the defendant had been injured, and that that had been received as the law which was not the law; this would have been good ground for granting a new trial. After this evidence had been received, Mr. Duponceau, counsel for the plaintiff, produced the Digest of the Civil Law of Louisiana, published by the legislature in 1808, not for the purpose of proving that the law, with respect to the rights of married women, was law of positive enactment; but to show that it was the law before the cession

of Louisiana to the United States; not that it was then first enacted. And the book clearly proved this; for that book does not purport to be original enactments, but a digest of the whole body of civil law; a codification, not new enactments. But a Spanish work is produced, which the defendant says does prove that it was the law--the written law, or edicts. The book is called *Recopilacion de las Indies*. It does contain chapters on espousals, and some incidents of marriage; but his counsel did not pretend another law, another edict on this subject variant from the law as stated from Mr. Canonge. In truth and in fact, the laws as stated by that gentleman to have existed in New Orleans in 1791, and ever since, I take to be the Roman civil law; for the law as he stated it, was precisely as in the digest of 1808, and the Napoleon code; so that it is nothing more than a compilation. In pages 385, 396, the law of Louisiana is given on this subject nearly in the words of Mr. Canonge and the Napoleon code. Mr. Griffith states, in the third volume of his Register, 674, this digest of the civil law to be now in force in Louisiana; and in the Appendix (page 700), that this digest was chiefly modeled on the civil law; in some respects raised by local usages and territorial acts, passed at the time of its compilation; by which laws New Orleans was regulated at the time of its cession.

But there seems to be a difference of opinion. The late president Jefferson, in his pamphlet on the Batture, says they were the laws of France, and when Spain obtained possession in 1769, the changes introduced were chiefly in organizing the government, but little in jurisprudence. In pages twenty-three and twenty-four he asserts that the great system (p. 21) which regulates property, the rights of persons or things, was the French law; and the Spanish law leaves the rights of the people untouched. This is denied by Mr. Livingston, in his answer to the pamphlet, who contends that the *Recopilacion* or Digest of the Laws of Castile and the Indies, is the system. Chancellor Kent, in his commentaries on the laws (p. 421), observes that the great body of the Roman and civil law, as well in some of the European countries, as in the new states of Spanish America, in the province of Lower Canada, and in one of the United States, Louisiana, is the basis of the unwritten common law. He refers to the civil code of Louisiana, as published in 1823. And that civil common law is now taught and obeyed, not only in France, Germany, Holland and Scotland, but in the islands of the Indian Ocean, and on the banks of the Mississippi and St. Lawrence.

In the Scotch cases on marriage, brought up by appeal before the house of lords, the depositions of the learned in the law were resorted to as evidence of the law of Scotland. In Prec. Ch. 208, an arrangement in marriage between two French people in France, touching the wife's fortune, was ordered to be executed. It was the agreement it should go according to the custom of Paris, and evidence was given of that custom. This was a bill by the wife's relations, many years after her death, to have the benefit of the contract, and it was so ordered. And in 1 P. Wms. 431, on a marriage contract in Holland, the same law was held, but that it must be proved what were the laws of Holland. There has been nothing produced on the argument of this matter to show that any law, written or unwritten, prevailed in Louisiana at the time of this contract, different from that stated by Mr. Canonge. His deposition stands uncontradicted. It is fortified by the Digest of Louisiana of 1808, and by the Napoleon code. There is, therefore, no reason to direct another trial on this ground.

The fourth reason assigned is evidence discovered since the trial. It must be a cause under very peculiar circumstances that would warrant the court to grant a new trial for this cause. But here the newly discovered witness was the sister and legatee of the testator; a person directly interested in the event of the cause, and all she attempts to prove is the death-bed declaration of the testator. This has not been urged on the court; indeed, no argument could be raised on it.

The fifth is because the letter of the plaintiff to the executor, before payment made by him to the legatees, absolves him from all charge of *devastavit*. The payment to the legatees was not compulsory, but voluntary. It was within the year, and if the executor chose to pay it without taking a refunding bond with security, he must blame himself. If he trusted the legatees, he should suffer, and not the creditors. Besides, it is no answer for the executor to say, I paid over to the legatees. It is a *devastavit*, unless indeed the creditors had acted deceptiously, or encouraged or connived at the payment. The correspondence shows nothing of this kind, and the suit was commenced with great celerity. All was done within the year.

The seventh cause is, that the plaintiff never having resided out of Louisiana since her marriage, and her husband never having resided in Louisiana since the year 1791, the plaintiff is barred by the act of limitations from having the right to bring the action notwithstanding the coverture. This is connected

with the third; which is, because the judge charged that no length of time whatsoever, unaccompanied with other circumstances, was sufficient to raise a presumption of payment, or satisfaction of the debt. I stated to the jury that the time would not begin to run during the coverture of the plaintiff, and the suit was brought six years after discoveriture. That it was a case of positive enactment; the time of the statute, and nothing short of that was a bar. That time had expired after discoveriture. The jury would, if there were such circumstances as satisfied their consciousness that the money was paid, find for the defendant. The circumstances would not have warranted a finding of payment. On the words of the instrument the parties had a view to his death before his return from that voyage; his representatives were to pay it to her. He never did return, and the event has happened on which it was to be paid to her. But according to the evidence and the law, this money was recoverable by the wife or her heirs on the dissolution of the marriage, and an action would lie by such heirs for the restitution of the property, and there are counts in the declaration so stating the contract.

But if the money were immediately payable I do not think that the statute would bar. The argument is, that she might have filed a bill in chancery against her husband, she being a citizen of another state in the circuit court of the United States. Two answers may be given to that: 1. A wife can not be a citizen of another state; her domicile is the domicile of her husband, her settlement is his. They are but one body; and though it may be that in a court of chancery a wife might file a bill against her husband, yet the bill would not lie in any court of the United States, because she never would be considered as a citizen of another state; and as a citizen of the same state, it is not quite clear that one could file a bill personally against the other. In the chancery cases it will be found that she might file a bill for appropriating a fund in which the husband would necessarily be a party; but it is believed she could have no personal decree to recover money from him.

But be this as it may, the case is expressly provided for by the fifth section of the act of limitations; she falls within the very letter of that provision. "If such person at the time of the action accrued, be within the age of twenty-one years, a *feme-covert*, etc., the same person shall be at liberty to bring the same action, so as they take the same within six years, as are hereby before limited, after they come of full age, discover-

ture, etc." It is not incapacity to sue that suspends and preserves the right; for infants might sue lunatics and persons beyond sea. It is, however, contended that if this matter could be sustained at all the wife might have brought it in the Pennsylvania courts of common law. It had not been denied that if the testimony of Mr. Canonge was credited the contract was a valid one; and it is just to observe his deposition had been long taken. The defendant was apprised both of the evidence and the law, and that it was to be proved by parol; and if there had been other or different laws he had full opportunity to disprove this testimony. Whatever may have been the flexible opinions in England about the right of married people, it is there settled finally that the wife can not sustain an action against the husband. The good old common law is restored. It was the common law of that country at the time of the revolution, and is now the common law there, as it always has been here. In *Marshall v. Rutter*, 8 T. R. 545, it was settled by the opinion of all the judges, that a *feme-covert* can not contract and be sued as a *feme-sole*; though she be living apart from her husband, having a separate maintenance secured to her by deed. Lord Kenyon, who delivered the opinion of all the judges, says it was asked, whether after separation, the wife could be convicted of felony committed in the presence of her husband? Whether they could be witnesses for or against each other? and whether they could sue or take each other in execution? Many other questions will occur to every one, to which it will be impossible to give a satisfactory answer; for instance, it may be asked how it can be in the power of any persons, by their private agreements, to alter the character and condition which by law results from the state of marriage; and for them to confer rights of action and legal responsibilities by such alteration, or how any power short of the legislature can change that which by the common law of the land is established as the course of judicial precedent.

The course is to have the intervention of trustees. The law was so laid down by this court in 10 Serg. & R. 208. In case of abjuration, banishment, or transportation of the husband beyond sea, she may be sued or she may sue as a *feme-sole*; because that amounts to a civil death. Even transportation for a term of years has been considered as a case of some difficulty, with respect to the enjoyment of the husband's estate, both real and personal. This contract, as to its legal construction, must be governed by the laws of Louisiana, as they were when

it was entered into, and when the marriage took place. The plaintiff has proved that this was a valid contract; but the mode of redress must be according to the laws of our forum. Our act of limitations governs as to time; it governs in the form of action; and in the consideration of the grade of debt, whether specialty or simple contract. It is a simple contract debt, barrable according to our act of limitations, and the remedy is in this form of action; I say barrable, but it is not barred.

The last objection remains to be considered. It is that, if it be the law, that the wife can not sue the husband, she can not sue her husband's executors; but if this be a contract, where the day of payment is postponed until the death of the husband, then the right of action is only suspended. There are numerous decisions to this purpose; and it would not follow that, if it were payable immediately, the debt was extinct; the remedy only is suspended; and one among many other reasons for this is, that the husband and wife form but one body; but on his death, she being the survivor, has all the rights not extinguished by the marriage; and, therefore, her husband being dead, this can cause no strife between them. She may sue his executors. Like the settlement of a pauper, the right is suspended during his life, but revives on his death; or privileged persons, the remedy against them is suspended until the privilege ceases. Aliens during war, the right of action is suspended; on the return of peace it revives. In the case of 1 Raym. 515, in which a *feme-sole* takes a bond of a man she intends to marry, to leave her one thousand pounds at his death, Lord Holt was of opinion that the debt was extinguished; but Tourton and Gould were of different opinions. And Gould said that the bond was not extinct, but might subsist by the rule of law; for the law does not love that rights should be destroyed; but on the contrary, invents fictions to support them, such as abeyance; and the law never will work a release, since there are two rules of law which would be broken by the destruction of the agreement: 1. *Modus et conventio vincunt legem*; 2. That the law will not work a wrong, and a suspension of rights does not always work an extinguishment.

He observed that the law does not work an absolute extinguishment. In the 26 Hen. VIII, it is held that if there be a divorce, the wife shall have her goods again; and Fitzherbert and Norwich put the case of a bond by the husband before coverture, and said, although there was a suspense during the coverture, yet after the divorce she might sue him upon it. It

does not follow, because for certain reasons the right may be qualified, and recovery suspended during the coverture, yet when the reasons are removed by the death of the husband, she should have no remedy against the executors. The opinions of Tourton and Gould have prevailed over Lord Holt's; and modern judges have lamented that Lord Holt should have recourse to flimsy and technical reasoning, so evidently against law and conscience. In fact, the controversy here is between the wife and the husband's relations; for the plaintiff agreed, and the verdict is so taken, that all the husband's debts, specialty and simple contracts, shall be paid, in the first place, out of the assets. It is an honest claim, and there is no legal impediment in the way of recovery. It is doing what the husband declared should be done, a restoration by his relations of the money held by him in trust for the wife. And I am not certain whether a court of chancery on marriage in England would not decree the same thing to be done. In 3 P. Wms. 317, where a husband voluntarily, and after marriage, allowed his wife for her separate use to make profit of butter, poultry, etc., out of which she saved one hundred pounds, which the husband borrowed, and died, ordered that the wife should come in as a creditor, especially there being no defect of assets to pay debts. It was said by the chancellor, the strongest proof of the husband's consent that the wife should have a separate property in these savings is that he had applied to her, and prevailed on her to lend him this sum, in which case he did not lay claim to it as his own, but submitted to borrow it as her money. As to the difference between Pennsylvania and Louisiana interest, the point was not made on the trial, nor was it worth making; for the plaintiff will not get the principal. It is, however, agreed to be taken according to the interest of Louisiana. That being done, the rule is discharged.

Rule discharged.

Cited in *Sidwell v. Evans*, 1 Pa. 388, on the question whether foreign laws are to be construed by the court or the jury; and to the same point in *Boek v. Lanman*, 24 Pa. St. 447; and in *Hill v. Meyers*, 46 Id. 16, as an authority to show that the statute of limitations does not run where the right of action is suspended.

COMMONWEALTH v. ARRISON.

[15 SERGEANT & RAWLE, 127.]

INFORMATION IN THE NATURE OF A QUO WARRANTO lies in all cases where a charter exists, and a question arises concerning the exercise of an office claimed under that charter; but the court has the right to grant or refuse it, according to the circumstances.

A RULE was granted by the court against Arrison and others, the defendants to show cause why an information in the nature of a *quo warranto* should not be filed against them for exercising the office of trustees of the Ninth Presbyterian church in Philadelphia.

Dwight and Binney, for the defendants, contended that the office exercised by the defendants was not the subject of an information of this kind. The ancient *quo warranto* issued against an individual who usurped a franchise of the crown, and the king alone could proceed against the usurper. A franchise is a royal privilege in the hands of a subject: 2 Bl. Com. 37; Finch, 164, 166; 2 Inst. 493, 496; 1 Bulstr. 55. The extent of an information in the nature of a *quo warranto* is exactly the same as that of the ancient writ, and it is not granted except in cases where the writ lay: *Commonwealth v. Murray*, 11 Serg. & R. 73 [14 Am. Dec. 614]; *People v. Utica Ins. Co.*, 15 Johns. 387 [8 Am. Dec. 243]. It has been decided that an information of this kind does not lie in cases of private rights where no franchise of the crown has been invaded: *Rex v. Sir William Lowther*, 1 Str. 637; *Bruce's case*, 2 Id. 1161¹; *Rex v. Reynoll*, Id. 1161; *Rex v. Daubeny*, Id. 1196; *People v. Utica Ins. Co.*, 15 Johns. 369 [8 Am. Dec. 243]; *Rex v. Canes, Andrews*, 14²; *People v. H. & C. T. Co.*, 2 Johns. 190. The statute of Anne gave this remedy to private persons: Stat. 9 Ann., c. 20; 3 Bl. Com. 264; 2 Kyd on Corp. 424. But that statute does not extend to Pennsylvania. There has been no usurpation of a franchise against the state in this case. The state has granted this franchise by charter under the act of 1791, and many of the corporations under that act are private corporations, and the court will only grant this writ in cases of offices which are usurped against the commonwealth, or in which the public are interested. Informations are not matters of course, but are discretionary: 3 Bac. Abr. 644; Hawk. P. C., book 2, c. 26, sec. 9; *People v. Richardson*, 4 Cow. 102. The trustees in this case have the care of the church property and are limited to tempo-

1. *Lord Bruce's case*, 2 Str. 819.2. *Rex v. Canes, Andrews*, 14.

ralities, but the property is not in them. In *Commonwealth v. Murray*, 11 Serg. & R. 73 [14 Am. Dec. 614], the court show a strong leaning against this remedy in cases like the present.

Brown, Sergeant and Randall, for the relators. The court has exercised the power now asked for: *Commonwealth v. Woelper*, 3 Serg. & R. 29 [8 Am. Dec. 628]; *Commonwealth v. Dallas*, 4 Dall. 229; *Commonwealth v. Douglass*, 4 Binn. 117¹; *Commonwealth v. Browne*, 1 Serg. & R. 382; *Commonwealth v. U. F. Ins. Co.*, 5 Mass. 230 [4 Am. Dec. 50]. In England it is said that an information is always granted where a new jurisdiction or public trust is executed without authority: Kyd on Corp. 395, 417, 418, 419, 421; *Rex v. Nicholson*, 1 Str. 299.

In the present case there is no adequate remedy except by information. The public are greatly concerned in these corporations, and immense mischief may be done by persons who are unlawfully chosen as officers, unless there is a summary remedy for their removal. No distinction between public and private corporations can be maintained. They are all public, for they are emanations from the supreme power of the community, and all are established and guarded by a public law.

By Court, TILGHMAN, C. J. A rule was laid on the defendants to show cause why an information in nature of a writ of *quo warranto* should not be filed against them, for exercising the office of trustees of the Ninth Presbyterian church in Philadelphia.

Before entering into the merits of the case, the counsel for the defendants made a preliminary point, viz., that the office exercised by the defendants was a mere private matter, in which the public had no concern, and, therefore, not the subject of an information. This point was fully and well argued, and the court has been furnished with all the learning to be found in the books on the subject. The statute of 9 Ann. ch. 20, not having been extended to Pennsylvania, the court must derive its power from the common law: Bull. N. P. 211. That, however, is of little importance, as the better opinion is, that the statute gave no new jurisdiction, but was made for the purpose of regulating informations, and making the remedy more effectual, easy, cheap, and expeditious, in cases of persons acting as corporation officers. An information is said to be grantable, only where the ancient writ of *quo warranto* would lie, and that writ, according to the argument of the defendants, was confined

1. *Commonwealth v. Douglass*, 1 Binn. 77.

to cases where there was a usurpation of the king's prerogative, or of one of his franchises, or a misuser or non-user of some right or privilege granted by the crown.

A franchise is a word of extensive signification. It is defined by Finch, whom all subsequent writers have followed, to be "a royal privilege in the hands of a subject:" Finch, 164. Franchises are diverse, says Finch, and almost infinite. Of such sort are the liberty of holding a court of one's own; the right of warren in another's land; the right of holding markets, fairs, and taking toll, etc., etc. The commonwealth stands in the place of the king, and has succeeded to all the prerogatives and franchises proper for a republican government, and those only; for many branches of the royal prerogative would be altogether improper in this country. Informations have been granted in England, in almost all cases where the public were interested, in some of which it would be difficult to show that any prerogative or franchise of the king had been invaded. As in the case of the mayor or common council of Hertford, who took upon them to make strangers free of the corporation, without being qualified according to the charter. The reason assigned by Buller for granting this information, was, "because the injured freemen of the town had no other way of remedying themselves, or of trying the right."

To be free of a corporation, was certainly no royal franchise; but perhaps in a very large sense, it might be said that the king's prerogative was invaded, when his charter was violated, by admitting one as a freeman contrary to its provisions. If that principle be correct, it will have an important bearing on the case before the court. An information was granted against certain persons for acting as trustees under an act of parliament for enlarging and regulating the port of Whitehaven: 1 Str. 299. The granting permission to file informations of this kind, on the application of private persons, is a matter of discretion, and the court will refuse it in cases of little import, or where the injury is of a private nature. It was refused in *Sir William Lowther's case*, 2 Ld. Raym. 1409;¹ 2 Kyd on Corporations, 418, "for setting up a free warren," on the ground that it was of a private nature, and, therefore, proper to be prosecuted only in the name of the attorney-general, if the king should think fit.

So, in *The King v. Hansell*, 9 Geo. II., Cas. temp. Hardw. 247, Lord Hardwicke thus expresses himself: "The court, indeed, have themselves made this distinction, to grant informations for

1. Also reported 1 Str. 637.

public usurpations; but if it is only of a private franchise, not concerning the public government, as a fair, etc., the court has sometimes refused them, and directed an application to the attorney-general." It is observable that Lord Hardwicke does not here deny the right of the court to grant the information, but affirms it. Whether to grant or refuse it, in case of a church warden, has been a vexatious question in England, but has been finally settled against granting it. I find no instance of an information in nature of a *quo warranto* in that country, except in a case of a usurpation of the king's prerogative, or of one of his franchises, or where the public, or at least a considerable number of people, were interested. Neither do I find any case in which it has been denied that the court may in its discretion grant it, where an office is exercised in a corporation contrary to the charter. In England the number of corporations is very small indeed compared with the United States of America. Consequently the quantity of that kind of business which may be brought into our courts will be much greater than theirs. But that alone is not a sufficient reason for rejecting it. We are now to decide a general question on the right of the court, not on the expediency of exercising that right, either on the present or any other case.

Now to establish it as a principle that no information can be granted in cases of what the counsel call private corporations, might lead to very serious consequences. Perhaps it may be said that banks, and turnpike, canal and bridge companies, are of a public nature; but yet they have no concern with the government of the country or the administration of justice. They are no farther public than as they have to do with great numbers of people. But if numbers alone is the criterion, it will often be difficult to distinguish public from private corporations. Let us consider churches, for example. In some the congregation is very numerous, in others very small. How is the court to make the line of distinction. If you say that the court has the right in both cases to grant or deny the information, according to its opinion of the expediency, there is no difficulty as to the right. But if it be alleged that there is a right in one case, and not the other, the difficulty will be extreme. I strongly incline to the opinion that in all cases where a charter exists and a question arises concerning the exercise of an office claimed under that charter, the court may in its discretion grant leave to file an information. Because, in all such cases, although it can not be strictly said that any prerogative or franchise of the

commonwealth has been usurped, yet what is much the same thing, the privilege granted by the commonwealth has been abused. The party against whom the information is prayed, has no claim but from the grant of the commonwealth, and an unfounded claim is a usurpation, under pretense of a charter, of a right never granted.

Having given my sentiments of the principle on which the present question turns, I will now consider the authorities in our own courts, which I think bear me out in the view I have taken of it. The first instance of an information in nature of a *quo warranto*, was in the year 1799, in the case of *The Commonwealth v. Wray*, 3 Dall. 390.¹ The defendant exercised the office of treasurer of Cumberland county. The next reported case is *The Commonwealth v. Douglass and others*, inspectors of the prison of Philadelphia, in the year 1803. The information was granted: 1 Binn. 77. In the year 1811, an information was asked and refused in *The Commonwealth v. Smith*, clerk of the market of Pittsburg: 4 Id. 117. The sole reason of the refusal was, that the supreme court had no right to try an issue at Pittsburgh, otherwise the information would have been granted. In 1815, an information was granted against Liberty Browne, who exercised the office of collector of taxes in Philadelphia: *The Commonwealth v. Woelper, etc.* [8 Am. Dec. 628], is very much in point. There, not only was an information granted against the defendants, who acted as vestrymen of the German Lutheran Church of Zion, but on a trial they were convicted, and judgment of ouster given against them.

If it be said that the defendants made no objection to the power of the court, it is true; but yet it is of some weight, that the able counsel for the defendants, in a case much litigated, either did not think of the objection, or supposed it was not tenable. Next came the case of *The Commonwealth v. Cain and others*, vestrymen of St. Thomas' African Episcopal Church of Philadelphia, in the year 1820: 5 Serg. & R. 510; the information was granted without objection. Last of all was *The Commonwealth v. Murray*, who claimed to be the minister of the Wesley Church, in 1824: 11 Serg. & R. 73 [14 Am. Dec. 614]. There the point now before us was directly in question for the first time. The information was refused, because the party who moved for it claimed in opposition to the charter under which the defendant held. The court declined an opinion on the right to grant the information, but spoke of it as undecided, and

1. *Republics v. Wray*, 3 Dall. 490.

worthy of consideration; that is the only case in which there has been any suggestion of doubt. In all the others, the right was taken for granted. From the cases cited in this argument, from the Massachusetts and New York reports, I conclude that the judges of these states are in favor of the right to grant the information. I am of opinion, that this court has the right of granting, and at the same time the right of refusing, according to circumstances.

Cited as an authority to show that the court has the right to grant or to refuse leave to file an information according to the circumstances, in *Commonwealth v. McCloskey*, 2 Rawle, 386; to the question of jurisdiction in cases of usurpation of franchises, in *Commonwealth v. Delaware & H. C. Co.*, 43 Pa. St. 300. In *Commonwealth v. Graham*, 64 Id. 342, to show that the court had jurisdiction to issue a writ of *quo warranto* against persons usurping the office of trustees of a chartered church.

WHERE QUO WARRANTO LIES.—*People v. Utica Ins. Co.*, 8 Am. Dec. 243, and note 261; *Commonwealth v. Murray*, 14 Id. 614.

HART v. BOLLER.

[15 SERGEANT & RAWLE, 162.]

WHEN NEW NOTE IS SATISFACTION OF AN OLD ONE.—A new note given without any new consideration to the same person, and for the same sum as an old one, is not deemed a satisfaction thereof, unless so received and accepted, and whether it was so received and accepted or not, is a question of fact for the jury.

ERROR to the district court of the city and county of Philadelphia. Action on a promissory note, brought by Boller against Hart. The first count was on a promissory note drawn by Miller, payable to the defendant or his order, and by him indorsed to the plaintiff. This note was protested for non-payment, and notice given to the defendant, the indorser. The second count was on a note for the same sum, drawn and indorsed by the same parties, and dated on the day after the former note became due. This latter note was not paid nor protested, nor was any notice of non-payment given to the defendant. The question on the trial was whether or not the second note was a satisfaction of the first. The court charged the jury "that the second note was not a satisfaction or discharge of the first, and, therefore, the plaintiff was entitled to their verdict on the first count." To this charge defendant excepted.

Miller and Lowber, for the plaintiff in error, cited Chit. on

Bills, 371; *Smith v. Becket*, 13 East, 187; *Brown v. Maffey*, 15 Id. 216; *Slaymaker v. Gundacker*, 11 Serg. & R. 75.¹

Keemle, for the defendant in error, cited: *Levy v. Peters*, 9 Serg. & R. 127 [11 Am. Dec. 679]; 11 Id. 182; *Bond v. Farnham*, 5 Mass. 170 [4 Am. Dec. 47].

By Court, TILGHMAN, C. J. It is a general rule, that if one indebted to another by note, gives another note to the same person for the same sum, without any new consideration, the second note shall not be deemed a satisfaction of the first, unless so intended and accepted by the creditor. But if so accepted, it is a satisfaction. The *quo animo*, it was accepted, is matter of fact which the court cannot take to itself, and exclude the jury from the decision of it. The intent may often be deduced from circumstances, though nothing positive was expressed. We are of opinion, therefore, that the district court erred in assuming the determination of this point as matter of law. It should have been submitted to the consideration of the jury, whether the second note was accepted in satisfaction. The judgment is to be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

The authority of this case is recognized and its doctrine approved, in *Lisby v. O'Brien*, 4 Watts, 142; *Hays v. McClurg*, Id. 454; *Weakly v. Bell*, 9 Id. 280; *McIntyre v. Kennedy*, 29 Pa. St. 451; *Jones v. Shawham*, 4 Watts & S. 263; *Brown v. Scott*, 51 Pa. St. 363. It is cited to show that the question, whether or not the new note was received as a satisfaction for the old one, is for the jury to determine, in *Mason v. Wickersham*, 9 Watts & S. 101; *Stone v. Miller*, 16 Pa. St. 456.

DAVIS v. HAVARD.

[15 SERGEANT & RAWLE, 165.]

THE AWARD OF ARBITRATORS UNDER A COMMON LAW SUBMISSION, determining a boundary line, is conclusive between the parties, and a court of equity will compel a specific execution of such award.

ERROR to the common pleas of Chester county. Trespass. The opinion states the case.

Dillingham and Binney, for the plaintiffs in error, cited *Greer v. Boyd*, 11 Serg. & R. 205²; *Calhoun's Lessee v. Denney*, 4 Dall. 120³; *Dixon v. Morehead*, Addison, 216; *Kern v. Smith*, 2 Brown, 99⁴; *Kyd on Awards*, 55-62; *Peebles v. Reeding*, 8 Serg. & R.

1. 10 Serg. & R. 75.

2. *Duer v. Boyd*, 1 Serg. & R. 203.

3. *Calhoun's Lessee v. Dunning*, 4 Dall. 120.

4. *Kerr v. Smith*, 2 Browne, 99.

484; *Hall v. Hardy*, 3 P. Wms. 187; *Ward v. Griffith*, Swanst. 53; *Bourk v. Willer*, 4 Johns. Ch. 405¹; *Buckly v. Stewart*, 1 Day, 130; *Doe v. Napier*, 3 East, 15.

Edwards and Tilghman, for the defendant in error, cited *Williams v. Craig*, 1 Dall. 314; *Wickoff v. Coxe*, 1 Yeates, 353; *Warder v. Wharton*, 2 Id. 513; *Bond v. Olden*, 4 Id. 243; *Lower Dublin Sch. v. Paul*, 1 Binn. 59; *Van Cortlandt v. Underhill*, 17 Johns. 405; *Burton v. Knight*, 2 Vern. 514; *Ives v. Johnson*, 1 Atk. 64; *Spettigue v. Carpenter*, 3 P. Wms. 362; *Corneforth v. Geer*, 2 Vern. 705; *Lingood v. Ead*, 2 Id. 501; *Hide v. Cooth*, 2 Id. 109; *Herrick v. Blair*, 1 Johns. Ch. 101; *Chicot v. Lequesne*, 2 Ves. sen. 315; *Earl v. Stocker*, 2 Vern. 251; *Trusloe v. Yewre*, Cro. Eliz. 223; *Stultz v. Dickey*, 5 Binn. 287; 8 Com. Dig. 112.

By Court, TILGHMAN, C. J. This was an action of trespass, brought by Davis Havard, the plaintiff below, against Davis and Kugler, the plaintiffs in error, for breaking and entering his close with force and arms, etc., and cutting down his trees, etc. The plaintiffs pleaded not guilty and *liberum tenementum*, etc., to which the plaintiff replied, "freehold in himself," and issues were joined.

The dispute was concerning a boundary line, and the defendants gave in evidence an agreement between Benjamin Havard, under whom the plaintiff claimed, and themselves to submit the location of this boundary line to the arbitrament of three men, whose award was to be considered as fixing the said boundary line forever. The parties to this agreement bound themselves respectively to each other in the sum of five hundred dollars, to abide by the award of the arbitrators. The defendants also gave in evidence an award in writing, made by the three arbitrators, under their hands and seals, which was recorded in pursuance of the said agreement. The principal question on the trial was, whether the submission and award were conclusive on the plaintiff. If conclusive, the cause was with the defendants, who had entered and cut the trees on their own side of the line established by the award. The president of the court of common pleas charged the jury that the submission and award were evidence for the defendants, but not conclusive; to which charge the counsel for the defendants excepted.

The question resolves into two points: 1. Whether the title to land can be bound by an award; 2. Whether chancery will decree a specific execution of such an award.

1. *Bouck v. Wilber*, 4 Johns. Ch. 405.

1. On the first point, the courts do not seem to have held a uniform opinion. It is certain that an award can not make an actual transfer of the title to land, and, therefore, it appears in some of the old cases an inference was falsely drawn that it was not conclusive on the title. Supposing that in strict law it was so, it did not follow that equity would not decree a specific performance, after which the award would become conclusive. No agreement short of a conveyance can make a transfer of land, yet it is the daily business of chancery to compel the performance of such agreements; and with us, who have no chancery, a decree for specific performance is considered as made in all cases where a chancellor would make it. No satisfactory reason has been given why the proprietors of land should not have as much power to bind the title by an award, as the title to personal property. The same policy which permits one is applicable to the other; and indeed, the fluctuation of sentiment on this subject seems at length to have settled down into an opinion conformable to common sense, that the owners of property, either real or personal, may submit the title to the decision of arbitrators, whose award shall be conclusive. Kyd, in his treatise on awards, after mentioning the difficulties which had been raised by the judges in former times, comes to the following conclusion (p. 61): "It may safely be considered as law, that when the parties might, by their own act, transfer real property, or exercise any act of ownership with respect to it, they may refer any dispute concerning it to the decision of a third person, who may order the same acts to be done which the parties themselves might do by their own agreement. Therefore, when we are told that an arbitrator can not make an award of freehold, and that he can not award the freehold of one man to another, we are to understand these expressions to mean no more than that land can not be transferred by the mere magic of the words of the award, but that it is necessary the award should order such acts to be done as would, if done by the voluntary agreement of the parties, amount to a specific transfer." I believe that in this short summary the result of the decisions, down to the publication of Kyd's treatise, is pretty accurately stated. But it is worthy of observation, that in the case before the court no difficulty about land occurs. No conveyance is ordered to be executed by one party to the other, because there was no occasion for one. Nothing but a question of boundary was submitted to the arbitrators. The dividing line being fixed, the title follows of course. The award is conclusive evidence of the boundary, and, consequently,

conclusive evidence that the title of each party always extended to that boundary, and no further.

2. Now, then, as to the second point, why should not chancery compel a specific execution of such an award, as well as of any agreement respecting land? The agreement here was, that the line established by the arbitrators should be considered as the fixed boundary forever. The award, then, may fairly be considered as the agreement of the parties to fix the boundary. Why should either party be allowed to recede from this any more than from any other agreement? The circumstance of their having bound themselves in a penalty to abide by the award, for the recovery of which an action at law may be maintained is of very little weight. The same objection arises in many cases where a specific performance is decreed. The intent of the parties was to settle all disputes touching the boundary, which intent can not be carried into effect by an action for the penalty. Whatever might be the result of that action, the original dispute would still remain unsettled. Chancery, therefore, would go to the root of the evil and fix the boundary according to the award, which would make an end of all disputes. I think the law is well settled that a specific execution of an award concerning the title of land will be decreed in equity.

In 1 Madd. Ch. 401, it is said to be clear that a bill will lie for a specific performance of an award, even though the award be unreasonable, the arbitrator being a judge of the party's choosing, and the award being considered as ascertaining the terms of a previous agreement. But though if the award decide anything to be done respecting land, the court, it seems, will decide a specific performance, it will not execute an award for the payment of money. In *Bishop v. Bishop*, 1 Ch. Rep. 142, and *Hall v. Hardy*, 3 P. Wms. 187, a specific performance of awards concerning land was decreed. In these two cases the plaintiff had performed some part of the award. But in *Norton v. Moscall*, 2 Vern. 24, where a similar decree was made, no part of the award had been performed. All that the plaintiff had done was the selling off a piece of land in order to raise a sum of money which he was ordered by the award to pay to the defendant. And in this case the award was so badly drawn as not to be binding at law. So that part performance by the plaintiff does not seem to be essential for the support of his bill. Nor is there any reason why it should be considered as essential, provided the plaintiff holds himself ready to perform his part.

The case of *Sellick v. Sellick*,¹ decided by the supreme court of New York, 15 Johns. 197, is directly in point. It was there held that an award fixing a boundary line of land between the parties to the submission was a justification in an action of trespass brought against the party who entered and cut trees on his own side of the line fixed by the award. In *Bouck v. Wilber*, 4 Johns. Ch. 405, Chancellor Kent corrected what he considered as a clear clerical error in an award concerning land, and decreed a specific performance. In *Shackeleford v. Purket*, 2 Marsh. 470 [12 Am. Dec. 422], it was decided by the court of appeals of Kentucky, that although an award can not convey the title of land, still it is binding on the parties, and estops them from disputing the title affirmed by the award. But the counsel for the plaintiff in the present case relied on the decisions of our own courts; so that it became necessary to review the Pennsylvania cases. The strongest in favor of the plaintiff is *Dixon's Lessee v. Moorhead*, tried before McKean, C. J., and Smith, J., at *nisi prius*, in Westmoreland county, in May, 1798. That was an award at common law, and it was held not to be conclusive as to the title of land. The same question, between the same parties, had come before the court of common pleas of Westmoreland county, at June term, 1794, when a verdict was given against the award, but a new trial was granted at December term, 1795, President Addison having changed his mind after the trial, and being of opinion that in his charge to the jury he had not given sufficient weight to the award. For the opinions of Chief Justice McKean and Judge Smith, I entertain a sincere and high respect, but it must be remembered that this was a *nisi prius* decision, which we all know is not of the same authority as a judgment in bank. The same judges who have necessarily decided in haste at *nisi prius* often came to a different conclusion after a full argument in bank.

Thus we see that the opinion of President Addison was altered, after further discussion on a second argument and more time for mature deliberation. The case of *Calhoun's Lessee v. Dunning*, also at *nisi prius*, tried before Shippen and Bradford, justices, at Carlisle, in May, 1792, appears, according to the report of it in 4 Dall. 120, to have been in direct opposition to *Moorhead's Lessee v. Dixon*. Shippen, J., charged the jury that "although an award could not give a right to land, yet it would settle a dispute either in an ejectment or an action of trespass,

1. *Sellick v. Addams*.

and that it had been so decided in the case of *Fox's Lessee v. Franklin*," of which no report has come to my knowledge, either in print or in manuscript. It is proper, however, to mention that Yeates, J., in delivering his opinion in *Duer v. Boyd*, 1 Serg. & R. 213, said "that he had seen the notes of Judge Shippen in *Calhoun's Lessee v. Dunning*, which contained the arguments of the counsel but not the opinion of the court, and that he was strongly inclined to think that implicit confidence was not to be placed in the accuracy of the report in 4 Dall." It is to be regretted that Judge Yeates did not ascertain what the opinion of the court really was, because his remarks have thrown a cloud over the case of *Calhoun v. Dunning* which it is impossible now to dispel. The only instance in which the efficacy of an award respecting the title to land has been brought directly before the court sitting in bank, was in the case of *Duer v. Boyd*, etc., 1 Serg. & R. 201. It was there decided that an award made under a rule of court, entered in an action of ejectment under the act of 1705, was not conclusive, but had just the same weight as a verdict in an ejectment. The reason of that decision was, that the act of 1705 gives to the award the same efficacy as if it were a verdict, and judgment is entered on it as on a verdict. It could, therefore, have no greater weight than a verdict in ejectment, which certainly is not conclusive. When a rule of reference is entered in an ejectment under the act of 1705, it must be presumed that both parties know the law, and therefore could not have intended that the award should have a greater effect than a verdict. That was my opinion in *Duer v. Boyd*, but I expressly avoided committing myself as to the effect of an award at common law. These are all the Pennsylvania authorities, and I consider them as leaving undecided the question now before us, which is, whether an award of arbitrators, under a submission at common law, fixing a boundary line between the parties, be or be not conclusive. Feeling myself at liberty to exercise my own judgment, I am of opinion, for the reasons before given, that the award is conclusive. There was error, therefore, in the charge of the court, for which the judgment is to be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

This case is cited with approval as to the conclusiveness of an award in *Perot v. Packer*, 2 Ash. 169; *Bowen v. Cooper*, 7 Watts, 313; *Speer v. Chesney*, 2 Watts & S. 234.

McMULLEN v. WENNER.

[16 SERGEANT & RAWLE, 18.]

VENDOR AND VENDEE—A JUDGMENT AGAINST THE VENDOR, after the execution of articles of agreement but before the execution of a deed, binds the legal estate of the vendor. And the purchaser at the sheriff's sale would be entitled to the unpaid purchase-money, and could enforce that right in an action of ejectment against the terre-tenant.

ESTOPPEL IN PARS.—The obligor of a bond is estopped to set up an equitable defense thereto as against an assignee who took the bond on the obligor's statement that he had no defense. The estoppel will arise although the statement was not made to the assignee, but merely in his presence.

DEBT on a bond. The opinion states the case.

Weidman and Foster, for the plaintiff in error.

Norris and Elder, contra.

By Court, ROGERS, J. This was a suit brought to recover the sum of one hundred and thirty-one dollars fifty cents, on a bond given to secure part of the purchase-money of a tract of land sold by the defendants to Daniel McMullen, and assigned by him for a valuable consideration to the plaintiff, Ann Fox, since intermarried with John Rudy.

There is no doubt that the assignee of a bond, whether the assignments be legal or equitable, takes it at his own peril, subject to every defalcation which might have been made against the obligee by the obligor at the time of the assignment, or notice of it: 1 Dall. 23; 2 Id. 49; 4 Serg. & R. 177. The defense relied on was, that the bond on which suit was brought was given to secure the payment of the purchase-money of a tract of land sold by Daniel McMullen to Daniel and John Wenner. That subsequent to the articles of agreement, but before the execution of the deed, Samuel Ensminger obtained a judgment against Daniel McMullen, to wit, to the December term, 1814, No. 44. The first question raised by the plaintiffs in error is, what is the legal effect of this judgment? And about this we have no difficulty. It binds the legal estate of Daniel McMullen in the land, which was not parted with at the time of the rendition of the judgment. The sheriff's vendee would stand precisely in the situation of McMullen, and therefore it is incumbent on a purchaser to search the office for judgments before payment of his money, up to the time of the execution of his deed. The sheriff's vendee would be entitled to the unpaid purchase-money; the payment of which he could enforce by an action of ejectment against the terre-tenant of

the land. The sale of the legal estate by a judgment mesne between the articles of agreement and the execution of the deed would transfer, as a necessary incident, the money remaining unpaid. And in this there is no hardship upon the original vendee, as he has notice upon record, and can have no difficulty in protecting himself, if he uses ordinary diligence.

In an action of ejectment brought by the vendee of the sheriff, the original vendee could protect himself only by payment or tendering the purchase-money unpaid at the time of the rendition of the judgment. On doing so, he would be entitled to a conveyance of the legal title vested in the sheriff's vendee. In the case of the sale of an equitable interest in lands, it has already been decided that the vendee of the sheriff stands in the same situation as the former owner of the equitable interest. In *Auwater v. Mathiott*, 9 Serg. & R. 397,¹ it has been held that the judgment-creditors of a vendee of land, who has paid part of the purchase-money, and has possession of the land, but has received no deed, are entitled to the proceeds of sale of his title under an execution, in preference to the vendor. By the law of Pennsylvania, all the real estate of the debtor, whether legal or equitable, is bound by a judgment against him, and may be taken in execution and sold for the satisfaction of the debt. At common law, an equitable estate is not bound by a judgment or subject to an execution. We have no court of chancery, and have, therefore, from necessity, established it as a principle, that both judgment and execution have an immediate operation on equitable estates: 9 Serg. & R. 397. If, then, a judgment binds an equitable interest in lands, *a fortiori*, it binds a legal interest, and to the extent of the interest at the time of the judgment.

Although *prima facie* the obligor may make every defense against the assignee, which at the time of the assignment, or notice of it, he could have made against the obligee, yet he may by his own conduct preclude himself from the benefit of that right. Thus it has been held that if the assignee calls on the obligor, and informs him he is about to take an assignment of his bond, and the obligor acknowledges that it is due, without any allegation of defense, he shall not be permitted to take defense against the assignee. And this, whether his silence proceeds from ignorance or design. It would be most inequitable and unjust, that he should; because if any loss afterwards occur, it arises from the negligence or folly of the obligor, and not the

1. *Auwater v. Mathiott*, 9 Serg. & R. 397.

default of the assignee, who has taken every pains to inform himself of the real situation of the parties. If any injury accrues, it is right that he who causes it should bear the loss. The cases all go upon the ground that the assignee has acted with good faith, and without notice of any defect of title, or valid defense, and with a wish not to ensnare the obligor, but to protect himself. As bonds are an article of commerce, and are made transferable, equitably and expressly by an act of assembly, it would be legalizing fraud to hold any other doctrine. It appears that Daniel McMullen came to the house of old Mr. Fox, offered to sell his bond, that Henry Fox with Daniel McMullen called on Jacob Wenner, and told him he had found out a place to sell the bonds. That McMullen took the bonds out of his pocket and laid them on the table, and that Wenner took them up and looked at them and said: "Yes, they are my bonds, and I am willing to pay them at any time, but I have not got the money now." McMullen then asked him if he was willing old Fox should buy them. Wenner said: "Yes, it will be better for me, if you sell them hereabouts; then I can pay them easier than go to Halifax to pay them." McMullen then told Wenner that it was for this old Fox had sent his son along with him; that he did not trust to him. McMullen then asked Wenner again if he was satisfied. He said: "Yes, I would rather have it so than not." That this conversation was communicated to old Fox in the presence of Ann Fox, and that Ann Fox purchased the bond and took the assignment on which this suit was brought.

It was not, it is true, Ann Fox who called on Wenner, nor was Henry Fox her agent; but this can make no difference in the principle. The question is, was Ann Fox induced to purchase the bond under the representation made by Wenner, which was communicated to her; that he had no defence, and that he was willing and desirous that the bond should be sold in the neighborhood. If this should be the opinion of the jury, who are the proper judges of the fact, and that there was no imposition on Wenner in which she was concerned, then every principle of law, and of common sense, would say that Wenner, and not Ann Fox, should sustain the loss, if any arises. In such a case the verdict of the jury should be in favor of the plaintiff to the amount due upon the bond.

Judgment reversed, and a *venire facias de novo* awarded.

APPROVED in subsequent decisions in Pennsylvania on the following propositions, that the equitable estate of the vendee, or the legal estate of the

vendor may be bound by a judgment against the one or the other, in *Catlin v. Robinson*, 2 Watts, 377; *Wilson v. Store*, 10 Id. 436; *Stewart v. Coder*, 11 Pa. St. 94; *Garrard v. Lantz*, 12 Id. 193; *Vierheller's Appeal*, 24 Id. 107; *Melton's Appeal*, 32 Id. 128; that where one of two innocent persons must suffer, he who occasioned the loss should bear it, in *Taylor v. Gitt*, 10 Id. 432; *Edgar v. Kline*, 6 Id. 331. On the principle of estoppel here announced, this case is followed in *Elliot v. Callan*, 1 Pa. 29; *Decker v. Eisenhauer*, Id. 478; *Scott v. Sadler*, 52 Pa. St. 214, where *McMullen v. Wenner*, together with *Edgar v. Kline*, *supra*, and *Weaver v. Lynch*, 25 Id. 449, is said to "settle this question morally and legally." Reference is also made to the principal case in *Secombe v. Steele*, 20 How. 106, upon the interest acquired by a purchaser under an execution sale of a vendor's title and interest in lands contracted to be conveyed.

TATE v. STOOLTZFOOS.

[16 SERGEANT & RAWLE, 35.]

A CERTIFICATE OF ACKNOWLEDGMENT of a release by a husband and wife, omitting to state that the wife was separately examined, is made good by the act of the third of April, 1826, which is constitutional.

EJECTMENT. The opinion states the case.

Rogers and C. Champneys, for the appellants, cited *Vanhorne v. Dorrance*, 2 Dall. 304.

By Court, DUNCAN, J. This was an appeal from the decision of Mr. Justice Huston, at a circuit court held at Lancaster, April, 1827, admitting in evidence the release of James Cochran and Jane Mary, his wife, on an acknowledgment of the instrument by husband and wife, of the twenty-eighth of May, 1796, of the wife's real estate, in the following words: "James Cochran and Jane Mary, his wife, came before me, the subscriber, one of the associate justices of the court of common pleas, in and for the county of Lancaster, and acknowledged the within instrument to be their act and deed, and desired that the same might be recorded as such." And also in instructing the jury that the release thus acknowledged was sufficient, under the provisions of the act of the third of April, 1826, to bar all claim to recovery in right of the wife.

It is contended, first, that this defective acknowledgment is not cured by that act. While I agree that the retrospective powers of this act are to be construed strictly, and that every law of this nature is to be construed with strictness, and not be extended by equity beyond the words of the statute, yet I can not agree to a construction that would defeat the end and object of the law, and, I must confess, it appears to me, that in words as

clear as our language affords, this provision embraces every defect, cures every invalidity in the certificate of acknowledgment, where the conveyance is a *bona fide* one. The purview, the preamble and the enacting clause conduce to prove that it was the intention of the legislature that no acknowledgment should be held invalid, defective or insufficient in law, by reason of any omission, formal or substantial, in not setting forth the particulars of an acknowledgment in the certificate; and my opinion is, that if the wife does acknowledge the conveyance to be her act and deed before an officer authorized by law to take it, this acknowledgment is sufficient, though it omit all the particulars required under the former act. It is impossible to make an enactment more expressive and comprehensive; for the naked acknowledgment is made as good, valid and effective in law, for transferring the estate, as if all the requisites and particulars of the acknowledgment recited in the former act had been particularly set forth in the certificate thereof, or appeared upon the face of the same. It is here to be observed that this act only alters defective acknowledgments before the first of September, 1826.

It is next objected that this act is unconstitutional. The general rule is, that all laws are in their nature prospective, yet this does not prohibit the legislature from passing some laws which have a retrospective operation. Where the laws do not impair the obligation of contracts, or are not *ex post facto* (*ex post facto* relates to crimes only), every confirmatory act is in its nature retrospective; and in the opinion of the court delivered in *Underwood v. Lilly*, 10 Serg. & R. 101, it is stated "that confirming acts are not uncommon. Deeds acknowledged defectively by *femes-covert*, proceedings and judgments of commissioners, and justices of the peace, who were not commissioned agreeably to the constitution, or where their power ceased on the division of countries until a new appointment. Retrospective laws which only vary the remedies divest no right, but merely cure a defect in proceedings otherwise fair—the omission of formalities which do not diminish existing obligations contrary to their situation when entered into. These and several like acts are clearly constitutional."

I have seen no reason to change that opinion. I will just add that it is an abuse of terms to contend that this is an act, divesting vested rights. Such acts would be odious and unjust as well as unconstitutional, for it is not intended by a vested right that it shall be a right to do wrong, to take advantage of

a mere slip in form, where the transaction is a *bona fide* one, and to avoid an honest conveyance fairly acknowledged in the hands of an innocent purchaser. Statutes made to confirm acts by public officers, which would have been void for some informality, have never been questioned on constitutional grounds: See *Bond v. Appleton*, 8 Mass. 472 [5 Am. Dec. 111]. It is well that this question has been brought up so early after passing the act, to put the matter at rest and silence the speculations, opinions and doubts expressed even by some men in the profession, and to relieve from apprehension those *bona fide* purchasers who might otherwise have been affected by informal certificates of acknowledgments, and that the hundreds, I might say thousands, intended to be relieved from danger from this one cause, may now repose in peace under this law confirming their titles; no man can make them afraid.

It is the opinion of the court that the appeal be dismissed and the judgment affirmed.

ROGERS, J., having been counsel in the cause, took no part in the decision.

FREQUENT reference is made to this opinion holding constitutional the act to which it relates, as being decisive of what acts, remedial in their nature, may have a retrospective operation: *Satterlee v. Mattheuon*, 16 Serg. & R. 191; *Koch's Estate*, 5 Rawle, 341; *Mercer v. Watson*, 1 Watts, 356; *Menges v. Wertman*, 1 Pa. St. 223; *McMasters v. Commonwealth*, 3 Watts, 294; *Lycoming v. Union*, 15 Pa. St. 171; *Schoenberger v. School Directors*, 32 Id. 37; *Weister v. Hade*, 52 Id. 480; *Grim v. Weissenberg School District*, 57 Id. 437; *Richards v. Rote*, 68 Id. 255; *Watson v. Mercer*, 8 Pet. 109; *Dentzel v. Waldie*, 30 Cal. 144; *Rich v. Flanders*, 39 N. H. 387.

SPANGLER v. COMMONWEALTH.

[16 SERGEANT & RAWLE, 68.]

THE SHERIFF MAY DEMAND AN INDEMNITY where there is such a claim to the property, adverse to the defendant in the execution, as would reasonably raise a doubt or apprehension as to the title, or create a pause in the mind of a constant man.

SCIRE FACIAS upon the bond of Spangler, as sheriff, and his sureties. The breach assigned was a failure to execute a certain *fiery facias*. It appeared that one Snodgrass, in June, 1820, sold certain goods and chattels to one Orson for the purpose of securing a debt, but retained possession thereof until 1822; that in August, 1820, Spangler was about to levy the *fiery facias*

mentioned on these chattels as the property of Snodgrass, when Orson claimed the same, and Snodgrass disclaimed all title thereto; that Spangler then asked an indemnity from Martin, the plaintiff in the execution, which being refused, the writ was returned *nulla bona*. The case was submitted upon an agreed statement containing these facts, judgment being taken for the plaintiffs.

Wadsworth, for the plaintiff in error.

Lewis and Dunker, contra.

By Court, DUNOAN, J. In a *scire facias*, on a recognizance given by the sheriff and his securities, the breach assigned was for a false return of *nulla bona*, on a *fiery facias* against one Joseph Snodgrass. The case stated in the nature of special verdict I refer to. This special finding opens a wide field of investigation on the duties of sheriffs. The general question referred to the court is, whether or not the plaintiffs were entitled to recover. This special case is very incorrect and imperfect, for whether the goods were the goods of Snodgrass, the defendant in execution, is not a fact stated, and the court can not induce or infer it from the circumstances, and therefore the cause goes back for that defect; but the court consider it proper to state their general views on the question agitated.

In England, it is certainly the course, where the sheriff has a doubt respecting the property of the goods, to inquire by a jury in whom the property is, or else not to meddle at all with such goods as do not plainly appear to be the proper goods of the defendant. The finding of this jury or inquest, will justify him in returning *nulla bona*, and mitigate damages in an action of trespass, if the goods seized should not happen to be the goods of the defendant: Dalt. Sher. 140; Gilb. Ev. 21. This finding by the sheriff's inquest does not settle the question of property between the litigant parties. It is not a proceeding immediately from the court, but merely an inquest of office to indemnify the sheriff in making the return to the writ; and the court will not set aside the inquest, nor order a new writ of inquiry; for this is an inquiry merely collateral to the cause, and is no part of the judicial proceedings: 2 Tidd, 921. The sheriff in seizing the goods acts at his peril, and therefore it would be a harsh doctrine to leave him unprotected and exposed to loss where he acts *bona fide*; this would be a severe line of justice. On the other hand, it would not seem reasonable that he should on shallow pretenses refuse to execute the writ; for

this would be leaving the plaintiff open to a connivance between the defendant and the sheriff to conjure up some unfounded claim of property in a stranger; and I would have been glad to have found the inquest by the sheriff introduced among us, but this never has been done in this state, and would seem, from the decision in *Weaver v. Lawrence*, 1 Dall. 156, not to be warranted.

It has been usual for the sheriff to require reasonable security in case of reasonable doubt, and this has been so generally acquiesced in, that no controversy has before this arisen on it. But a case might arise where the sheriff, on very frivolous grounds, might refuse to act without unreasonable security to indemnify him. The plaintiff might be poor, and not able to satisfy the sheriff as to the security offered. He might be distant, and the sheriff, on the most groundless claim, refuse to act; and where the goods are found in the hands of a defendant, claimed by another under a bill of sale or mortgage, and suffered to continue in the possession of the supposed vendor, who trusts the goods to him on his personal credit, to use as his own, thus enabling him to induce unwary men to trust him, and this claim should stop the hand of the sheriff, would seem to be an alarming proposition. It would afford a complete protection to the dishonest debtor. A plan might be formed, and would be formed, between him and some friend, that he should enjoy the goods for his own use, and the claimant would not molest him, unless the goods were seized by some person. What is, however, to protect a sheriff, if in all cases he were obliged to act, and to act, too, without any indemnification? If we have not used the inquisition to protect the sheriff, it does not follow that he is without protection.

It is, I know, difficult to draw any precise line, but I think, consistently with justice and in conformity to our practice, a line of justice might be drawn, which, while it protects sheriffs from unnecessary risks, secures plaintiffs from connivance between the sheriff and the defendant in the execution—and that is, that wherever there is a claim of property adverse to that of the defendant, of that kind which would reasonably raise a doubt or apprehension as to the title, or create a pause in the mind of a constant man, the sheriff has a right to call on the plaintiff for a reasonable indemnity. This must depend on the circumstances of each particular case. In an action for a false return, it ought to be a justification, as much as the inquisition, if one could be made by the sheriff. This would be a fairer mode than

suffering a sheriff to hold his own inquisition for his own justification. This power in his hands would be liable to great abuse; and even where the sheriff could hold an inquisition, if the plaintiff in the execution offer in writing to indemnify the sheriff, it would seem he is bound to proceed and sell, and can not excuse himself by taking an inquest: 15 Johns. 147; 8 Id. 185. The inquest is not conclusive on the question of property, though under certain qualifications in some cases it will excuse the sheriff, and protect him from a suit on a false return.

In the *Insurance Co. of Pennsylvania v. Kelland*, 1 Binn. 499, the court refused, on the motion of a defendant, to stay proceedings on an execution levied on goods in the defendant's possession, and direct an issue to try the property on an allegation that the goods belonged to third persons. That was an application by the defendant, and not by the sheriff, who took the risk on the security he had taken from the plaintiff; but I do not entertain a doubt of the power of the court, where the sheriff has levied to enlarge the time for the sheriff's making a return to a *fieri facias* until he is indemnified, on the suggestion of a reasonable doubt, for the purpose of inducing persons setting up claims to the property to contest them in a trial at law. The judgment, in this case, cannot stand. The record is remanded to the court of common pleas for the defect in the finding, and a *venire facias de novo* directed.

The court think it proper to suggest that a general verdict in this case would be best adapted to the attainment of justice when either party could except to the opinion of the court, on any question of law in which they might suppose they had misdirected the jury; for this court, on a special verdict, can neither make any inference, or draw any conclusion from circumstances when the fact itself is not found.

SHERIFF'S RIGHT TO INDEMNITY.—It very frequently happens that the goods upon which the sheriff has levied, or upon which the plaintiff desires he should levy, are claimed by a stranger to the writ. This claim may be made directly to the officer; or he may, before any such claim is made to him, know that the title is disputed and doubtful. In fact there is generally no need for a stranger to a writ, whose property has been seized, to make any demand upon, or to give any notice to the sheriff. He may lawfully treat that officer as a wrong-doer, entitled to no indulgence and no warning: Freeman on Executions, sec. 254. Hence, in the event of the title to personal property being involved in doubt, a prudent officer will take such means as are available for his protection without waiting for notice from persons claiming adversely to the defendant. Under the English practice, there were two modes of pro-

cedure open to the sheriff when a reasonable doubt existed in regard to his right to seize or hold property under execution, and he desired to avoid both the responsibility of returning *nulla bona*, and the responsibility of seizing or holding the property.

The first mode which we shall describe was much more effective than the other. It consisted in demanding indemnity from the plaintiff for seizing and selling the property, and from the claimant for releasing it. This demand being refused by both parties, the officer made an application to the court out of which the writ issued. He showed to the court that disputes in reference to the title existed, and that both parties had refused to indemnify him for proceeding. It was discretionary with the court whether or not it would interpose for his protection. But this discretion seems always to have been exercised in his favor, whenever it appeared that the doubts in regard to the title were reasonable, and the motives and conduct of the officer in demanding the indemnity were characterized by good faith, and were free from all suspicion of a desire to oppress either party, or to evade the performance of official duty. The method of protecting him was by making an order enlarging the time for the return of the writ. The length of time allowed by the court varied according to the exigencies of each particular case. Sometimes the officer was allowed only such extension of time as enabled him more thoroughly to satisfy himself as to the title; sometimes he was authorized to wait until the title was settled by litigation in another court; and sometimes "the court granted a rule for enlarging the time for the sheriff to make his return from term to term, until the sheriff should be indemnified: *Watson on Sheriffs*, 195, 197; *Venables v. Wilks*, 4 J. B. Moore, 339; *Thurston v. Thurston*, 1 Taun. 120; *Ledbury v. Smith*, 1 Chit. 294; *Rez v. Sheriff of Devon*, Id. 643; *Shaw v. Tunbridge*, 2 W. Bl. 1064; *Burr v. Feethy*, 1 Bing. 71; 6 J. B. Moore, 79; *Wells v. Pickman*, 7 T. R. 174; *McGeorge v. Birch*, 4 Taun. 585; *King v. Bridges*, 7 Id. 294; 1 J. B. Moore, 43; *Etchells v. Lovatt*, 9 Price, 54. It is obvious that this practice is in the highest degree commendable. It permits the sheriff to obtain indemnity in cases where the title is involved in substantial doubt. It thereby prevents the performance of his duties from becoming unreasonably and unnecessarily perilous. At the same time it does not leave it to his discretion to determine when he may refuse to proceed, and thus give him an opportunity to act unfairly toward the plaintiff.

Statutes have been enacted in many of the United States determining the circumstances in which officers may demand bonds of indemnity. In the absence of such statutes, it is very clear that our courts in proper cases will interpose to relieve sheriffs by enlarging their time for making their returns: *Miller v. Commonwealth*, 5 Pa. St. 297; *Dewey v. White*, 65 N. C. 225; *Bosley v. Farquar*, 2 Blackf. 61; *Forniquet v. Teggarden*, 24 Miss. 96; *Bryan v. Bridges*, 6 Tex. 143; *Jessop v. Brown*, 2 Gill & J. 404; *Adair v. McDaniel*, 1 Bailey, 158; *Hall v. Galbraith*, 8 Watts, 220. As a general rule, our practice seems more favorable to the sheriff than the English practice was. Indemnity seems to be conceded to an officer not as a matter of discretion merely, but as a matter of right. Its refusal by the plaintiff, where reasonable doubt of the title exists, will, no doubt, in many of the states, warrant the officer in not seizing or not holding the property, and the latter need not apply to the court to enlarge the time for making his return: *State v. Sharp*, 2 Sneed, 615; *Saunders v. Harria*, 4 Humph. 72; *Smith v. Osgood*, 46 Ala. 178; *Picard v. Peters*, 3 Ala. 493; *Mintner v. Bigelow*, 9 Port. 481; *Fitter v. Fossard*, 7 Pa. St. 540; *Shriver v. Harbaugh*, 37 Id. 399; *Commonwealth v. Van Dyke*, 57 Id. 34;

Marshall v. Hoosmer, 4 Mass. 63; *Bond v. Ward*, 7 Id. 125; S. C., 5 Am. Dec. 28; *Marsh v. Gold*, 2 Pick. 290; *Smith v. Cicotte*, 11 Mich. 383; *Board v. Helm*, 2 Met. (Ky.) 500; *Perkins v. Pitman*, 34 N. H. 261; *Patterson v. Anderson*, 40 Pa. St. 359.

This rule is by no means universal. In some of the states the officer has no right to indemnity until the claim made by a stranger to the writ has been tried by a jury and found in his favor: *Curtis v. Patterson*, 8 Cow. 67. In others the claimant may be notified of the levy, and unless he prosecutes proceedings within a specified time, waives his right to redress from the officer. In these states the plaintiff can not be required to furnish indemnity: *State v. Sandlin*, 44 Ind. 504; See Freeman on Executions, sec. 275.

Where the property which the sheriff is directed to seize is in the possession of a third person, the officer is entitled to an indemnity before proceeding in the execution of the writ. This point was raised in *Chamberlain v. Beller*, 18 N. Y. 115, an action by the sheriff on an indemnity bond given to protect him from damage arising on the seizure under an attachment of property in the possession of a third person. A question was made as to the validity of the bond, it having been given without a previous trial by jury. The court disposed of this objection by saying such a trial could be and was waived by the claimant and the creditor, and that the bond was therefore valid; and upon the subject of right to ask indemnity under the circumstances, Judge Roosevelt said: "Now the proof in the present case is that the officer, in demanding the bond, sought no advantage to himself, but simply desired, as it was natural he should, to protect himself against loss. The risk he was required to run was not for his benefit, but for the benefit of the attaching creditor. If the goods, moreover, as the creditor alleged, were the property of his debtor beyond dispute, he, the creditor, could not be injured by giving the indemnity; and if they were not, it was right that he, who for his own supposed advantage insisted on the seizure, should take the consequences of the act. Such would seem clearly to be the dictates of common sense and common justice; in other words, in the absence of contrary authority, of common law."

A similar state of facts was presented for the consideration of the court in *Long v. Neville*, 36 Cal. 455. The sheriff had refused to serve a writ of possession where there were persons in possession claiming the premises in their own right, unless the plaintiff would give an indemnity bond. The bond was not given, and the writ was not executed. The subject of right to an indemnity is quite fully discussed by Chief Justice Sawyer, speaking for the court, who, after adverting to the sheriff's dilemma in such a case and the difficulty he labors under of determining who may be legally entitled to the property, pertinently asks: "If the courts, after due investigation, with all the means at their command necessary for the purpose, find great difficulty in determining the question, how is a mere ministerial officer, possessing none of their facilities to ascertain the facts and apply the law correctly? The officer has no personal interest in the matter, and in a case of doubt, like the one in question, when the parties in interest are unwilling to take the responsibility and hold him harmless, why should he be compelled to act at his peril?"

It may happen that at the time of serving an attachment, there is no controversy as to the title, but that subsequently, when the officer is proceeding to sell upon the writ, or upon the execution after judgment, third persons step in and claim the property, and forbid the sale. In such an instance has the officer a right to demand an indemnity bond before proceeding, or is it his duty to go forward and sell at his peril? This question was

answered in *Smith v. Osgood*, 46 N. H. 178, the court being of opinion that the same rule applied in that case as in one where the claims of third persons were made at the time of the attachment.

Where there are several writs in the sheriff's hand, and he demands indemnity from all the plaintiffs, some of whom comply, and others refuse, he may decline to act for those so refusing, and proceed on behalf of those only who have indemnified him: *Pickards v. Peters*, 3 Ala. 493; *Burnett v. Handley*, 8 Id. 685; *Smith v. Osgood*, 46 N. H. 178; *Davidson v. Dallas*, 8 Cal. 227.

The principle applied in all these authorities in regard to the serving of writs upon property, and the right to demand an indemnity, also governs in cases where the officer is directed to arrest the body of a debtor, where he has reasonable doubts of the identity of the person, or of the propriety of the arrest: *Marsh v. Gold*, 2 Pick. 290; *Long v. Neville*, 36 Cal. 461; *Smith v. Osgood*, 46 N. H. 178.

KAUGHLEY v. BREWER.

[16 SERGEANT & RAWLE, 133.]

BOOKS OF ORIGINAL ENTRIES of a tailor are admissible, although the charges are made after the work is cut and delivered to a journeyman, but before it is completed, such being the usual manner in which the books were kept.

IN ERROR. The opinion states the case.

By Court, HUSTON, J. The plaintiff who was plaintiff below, produced his book of charges for work done as a tailor, not a merchant tailor, who found the cloth and trimmings, and made the coat, etc.; but one of those who, as is usual in the villages and country in this state, make into garments the cloth brought to their shop by their customers. He proved the book to be his book of original entries, and that the several entries were made at the time each bears date; but in answer to a question, he stated: "After I have cut out the work, and when I deliver it to the journeymen, I make the charge. The journeymen work in the house with me." That this was the manner in which he had kept his books. The books were rejected by the court, and exception taken.

This case has received very careful consideration. It is not clear of difficulty, and the court is not unanimous. It has long been settled that a storekeeper's, a tradesman's, or a day laborer's book of original entries of goods sold, or work done, is evidence to go to a jury; and so far as I know, very little complaint has existed on account of such decision. In 4 Serg. & R. 5, this court, as has been supposed, went one step further, and received a book containing entries of lime sent from a kiln to Philadelphia, to be given in evidence. These entries must

have been made several hours before the delivery, and without an absolute certainty that the lime would be delivered; but it was necessary to admit such evidence, or impose difficulties on that business, which would be great to the seller; and eventually increase the price to the buyer, without being of any general advantage. It is difficult to lay down any other rule than that such mode of keeping books as is usual and known to all tradesmen in the same business, and all customers, can not be safely declared bad by a court. It is known that in some trades the work is in hands for several days, and goes through more than one hand; and if the entry is made during the period of its manufacture, or at a stated time when it has progressed a certain length, I can see no objection to it, which does not apply with equal force to the whole, and which would not equally forbid entries to be made by the tradesmen from being received at all.

We do not say a shopkeeper can charge goods not yet measured or weighed off; nor a tradesman work not yet begun; but we hesitate when it is asked of us to say that a blacksmith who has prepared all the iron-work of a wagon ready to put on the wood, and who weighs it (it is usually done by weight), and then charges it in his book, and proceeds to finish his work by putting it to the wood, which employs him a week, shall lose the price of his man and work, or the evidence of it, which is the same thing; or chair-maker who makes and paints the chairs and charges them before he sends them to be gilt, shall not read his book of original entries. In the case before us, we think it is governed by the case in 4 Serg. & R., before cited; and that a tradesman who makes his entries after the work is begun, gone through one hand, and is in progress with him who is to finish it, may read his book, if no other objection is made to it. Where the cloth was furnished by the customer, we may assume that he will call for the coat. In this case I think the evidence ought to have been received.

GIBSON, C. J., and ROGERS, J., concurred.

TOD, J., dissented.

Judgment reversed, and a *venire facias de novo* awarded.

Cited in *Singerly v. Doerr*, 62 Pa. St. 14; *Wollenweber v. Ketterlinus*, 17 Id. 298; *Molony v. Benners*, 3 Grant's Cas. 234.

BOOKS OF ACCOUNT AS EVIDENCE.—See *Union Bank v. Knapp*, 15 Am. Dec. 191.

MCALLISTER v. HOFFMAN.

[16 SHERMAN & ROWLE, 147.]

MONEY BET on an election which is paid over by the stake-holder to the winner, contrary to the orders of the loser, after the result of the election is known, may be recovered back.

Action brought by McAllister to recover one hundred dollars deposited with Hoffman on a wager with one Turner, upon the result of a certain election. It appeared that McAllister told Hoffman, after the result of the election was known, but before the money had been paid over, not to pay it over to Turner. This Hoffman, nevertheless, did. There was some evidence of an indemnity received by Hoffman. The jury were instructed that the plaintiff could not recover if he had waited until the result of the election was known before directing Hoffman not to pay the money to Turner. Plaintiff excepted.

Blythe and Potter, for the plaintiff in error.

Banks and Blanchard, contra.

By Court, GIBSON, C. J. The result of the authorities undoubtedly is, that the loser may withdraw his stake at any time before actual payment to the winner. If then such be the rule in regard to those wagers that are void only by the policy of the common law, how much more reason is there for enforcing it when public policy has received the sanction of positive enactment? To the act of wagering on the election, the act of assembly not only annexes a penalty, but in terms declares the contract to be void; and as in construing remedial statutes the main thing is to make such a construction as will repress the mischief and advance the remedy, we are to determine whether the practice of betting on elections would not be more effectually cut up by suffering the loser to regain what he has lost at any time before it is delivered to the winner, than by narrowing the *locus penitentiæ* to the interval between the period of betting and the happening of the contingency; and it is impossible to doubt but that it would. A different conclusion would be a virtual repeal of the clause which declares the contract to be void.

It will be conceded that bets are seldom, if they are ever, made with a view to be revoked; and nothing would be more easy, if that were sufficient, than for the parties to preclude themselves from taking the advantage held out by the law, by depositing in the hands of a third person; and in such a case

to expect either to retract before the determination of the bet is known, is just as reasonable as to expect the banker at a gaming table to avail himself of the *locus penitentiae* while the card is trembling in his hand. In either case the hope of gain, which was the original inducement to the bet, continues to operate; but in the case of the political bet there are the additional incentives of party spirit, and the sinister consequences to be apprehended from an implied admission of numerical inferiority on the side of the party in favor of whose success the bet was made. It may be said the same arguments would prove the rights of the loser to maintain an action even after the money were paid over. I confess that I think the decisions ought originally to have gone that length.

In pari delicto is not a maxim of universal application; for where money has been paid on a contract which is illegal, merely because it is in violation of a rule which has for its object the protection of weak and necessitous men, it may be recovered back; and for the very reason that the rule itself would be frustrated by any other construction. The books contain many cases of the sort. Had the courts in cases of positive prohibition marched directly towards the object proposed by the legislature, instead of stopping to determine degrees of criminality, or fastidiously turning aside from the supposed turpitude of the transaction, they would have saved themselves the trouble of many a nice and useless distinction. What has the relative demerit of the parties to do with the prostration of the original cause of offense to the public; short of which a judge should not suffer himself to pause? By this I do not intimate a desire to overturn what has been established by many of the wisest and best judges which this country or that of our ancestors has produced. In the case before us there is the less reason to do so as the legislature has evinced by other laws that it was aware of the rule which prevents money that has been paid on an illegal contract from being recovered back; as in the case of money paid in violation of the act against horse-racing, which it is expressly declared may be recovered from the winner.

But we will not stop to inquire whether the loser claims through the illegal transaction, or paramount on his original right of property, or whether, having done all in his power to complete the contract, it would be inequitable to permit him to withdraw his bet after the risk had been borne by the other party. Such considerations must yield to the policy which dictated the prohibition, and which requires that it shall not be

eluded under any pretense. Whatever repugnance, therefore, we may feel to the claim of the plaintiff, we are compelled to say there is nothing in the way of his recovery.

Judgment reversed.

FOLLOWED in *McAllister v. Gallagher*, 3 Pa. 469; *Speise v. McCoy*, 6 W. & S. 486; *Forscht v. Green*, 53 Pa. St. 140; and in *Lloyd v. Leisenring*, 7 Watts, 295, where Judge Huston thus states the point decided in the principal case: "But it is said the case in *McAllister v. Hoffman*, 16 Serg. & R. 147, had decided that a stakeholder of a bet on an election, who pays it over to the winner without being forbidden by the loser, is not liable to the person who deposited the money. In the first place, that case decides a different point, viz.: That the person who deposited the money may recover it from the stakeholder who paid after notice not to pay; whoever reads the opinion of the present chief justice in that case will see that he was disposed to enforce the law to its full spirit, and not permit it to be evaded under any pretense; and he regrets that the weight and number of authorities have prevented courts from giving remedy to the loser in all cases by permitting him to recover back the money lost." *Lloyd v. Leisenring* was an action brought by Leisenring on an order directing him to deliver to one Frick two suits of clothes of the value of seventy dollars, if a certain candidate, at a specified election, received a majority of three hundred votes. The clothes were delivered and proceedings instituted for the recovery of the seventy dollars. Some evidence was offered to show that Frick had taken an undue advantage of Lloyd. But the court laid that evidence out of consideration, saying: "We decide on the principle that it was a contract or engagement declared by the legislature to be calculated to promote immorality and corruption, and that it is declared to be utterly null and void. In substance and effect the paper is a promise to pay Frick two suits of clothes if George Wolf has three hundred majority; or an engagement to pay Leisenring seventy dollars if he will pay Lloyd's bet when or if it is lost. No one can avoid discovering that if this money is recovered the act is a dead letter; that all contracts or promises founded on bets on the event of an election are not void; but that the act, instead of cutting up by the roots the practice of betting on elections, may be evaded by very simple contrivances." And in conclusion, it is added: "To enforce this law according to its letter and its spirit, we must say that the obligation on which this suit is brought is null and void, and perhaps human ingenuity can not invent any mode of evidencing such contract as that it will be available in a court of justice, if the fact that it was given to secure a bet made on the event of an election can be proved."

WAGERS DEPENDING ON THE RESULT OF AN ELECTION.—See *Bunn v. Riker*, 4 Am. Dec. 292, and note 299.

ACTIONS ON WAGERS.—See *Downs v. Quarles*, 12 Am. Dec. 337, and note 339.

JUNIATA BANK v. HALE.

[16 SERGEANT & RAWLE, 157.]

THE DEATH OF THE DRAWER of a promissory note, and issuance of letters of administration to the indorsers and others, before maturity, does not dispense with notice to the indorsers of non-payment.

ASSUMPSIT. The opinion states the case. Verdict and judgment for the plaintiff. Appeal from an order denying a new trial.

Alexander, for the appellants.

Benedict and Blythe, contra.

By Court, DUNCAN, J. This was an action against the defendants on a negotiable note, dated the tenth of November, 1816, for six hundred dollars, in which Starrett was the drawer, E. W. Hale the payee, Hale the first indorser, and Chriswell the second. It was a note for the accommodation of the drawer, and Hale declares in the memorandum subjoined to it that it was for the use of the drawer. It was payable in six months, and was discounted by the Juniata Bank. The drawer died before the day of payment; and on the second of December, 1816, letters of administration issued on his effects to Rebecca, his widow, Robert, his brother, and Hale and Chriswell. On the fourteenth of May, 1817, the note was protested, but no notice of demand was given to the indorsers, or either of them.

The Juniata Bank contended that notice of non-payment was unnecessary, inasmuch as the indorsers were two of the administrators, who in their character of administrators, must have had knowledge of the non-payment of the note, and had all the estate of the drawer in their hands to secure themselves. The indorsers insist that if knowledge was proved on them of the fact of non-payment, still they were entitled to notice from the Juniata Bank, the holder of the note, of the intention of the bank to call on them. And Chriswell, who is joined in the action under the act of assembly, insists, further, that he should have had notice; for although the note might not have been paid by the drawer, who died before it became due, still it might have been paid by the first indorser, and the notice of the non-payment was an important matter to him. It is further insisted by the defendants, that so far from the bank giving notice of an intention to look to them for payment, in 1818, they obtained a judgment by confession from the administrators, a special judgment *de bonis intestati*, and not otherwise, and that they delayed to proceed on this judgment, and did not call on the indorsers until this action was brought, which was lacking a few days of six years, when the statute of limitations would have barred the recovery.

On the trial of the cause before the chief justice at the late circuit court, for the purpose of having the question settled

in this court which is admitted to be new in species, he instructed the jury that neither the demand of payment nor notice of non-payment was necessary, and it was from this decision the defendants appealed; and on this opinion, it is now only necessary for this court to decide. From the view they have taken of this subject, if the court did not decide on the general doctrine of the necessity of notice of non-payment from the holders of the note, the circumstances of the situation in which Chriswell, the second indorser stood, and the judgment against the administrators, and the long delay in bringing the action, were matters worthy of serious consideration; but they have judged it most advisable to decide upon the general principle.

What is the nature of the engagement of the indorser? It is founded on the law-merchant, and is governed by its principles; his undertaking is only to pay in case the maker does not pay. The indorser takes it on the condition that he will first apply to the maker; and in an action by the indorsee against the indorser, the declaration must aver that on the note becoming due the demand was made of the drawer, and that he refused to pay, of which the defendant had notice. It is an essential part of the plaintiff's case, and even a verdict would not cure the omission. This was decided in the court of errors and appeals, and the judgment of the supreme court reversed: *Miles v. O'Hara*, 1 Serg. & R. 32. And though the declaration alleged that the drawer of the bill became liable by the custom of merchants, this is not sufficient, because the law-merchant is not matter of fact but of law, and the want of notice is the very gist of the action; for it is that which raises the implied promise: *McKinney v. Crawford*, 8 Serg. & R. 353.

That knowledge of non-payment is not notice is very clear; for the notice must come from the holder himself, or some one who is a party; for the notice must assert that the holder intends to stand on his legal rights and to resort to the indorser for payment; and, therefore, where the drawer had notice before the bill was due that the acceptor had failed, and gave another person money to pay the bill, and the holder neglected to give notice of its dishonor, it was held that the drawer was discharged: *Nicholson v. Gouthit*, 2 H. Bl. 612; *Whitfield v. Savage*, 2 Bos. & P. 277; *Esdaile v. Sowerby*, 11 East, 114, 117. And where a few days before the bill became due the acceptor informed the drawer that he must take it up, and gave him part of the money to assist him in so doing, and the latter promised to take up the bill accordingly, it was held that the latter

might nevertheless set up as a defense that the bill was not duly presented for payment, and that he had not regular notice of the dishonor: *Baker v. Birch*, 3 Campb. 107. The notice must come from one who can give the drawer or indorser his immediate remedy on the bill, and not from a stranger; otherwise it is merely a historical fact; it must be legal notice, otherwise the party is discharged from the liability he contracted by indorsing it: 2 Cowp. 177; Chit. on Bills, 292.

The reason given in *Ex parte Baisley*, 7 Ves. jun. 597¹, is very satisfactory; for the ground of discharging the drawee is that the drawer gave credit to some other person liable, as between him and the drawer. Notice from any other person than the holder that the note is not paid is not notice that the holder does not give credit to a third person. This is very strongly put by Ashurst and Buller, JJ., in *Tindall v. Brown*, 1 T. R. 167. According to Ashurst, "Notice means something more than knowledge, because it is competent to the holder to give credit to the maker. It is not enough to say that the maker does not intend to pay, but that the holder does not intend to give credit to such maker; the party ought to know whether the holder intends to give credit to the maker or to resort to him." And by Buller, J., it was said: "The notice ought to purport that the holder looks to the party for payment, and a notice from another party can not be sufficient; it must come from the holder." And this doctrine of Buller has been acted upon in many cases there, as Lord Eldon observed in *Baisley's case*. Now, here these indorsers ought to have had notice from the Juniata Bank; for that would be notice that they did not mean to resort to the estate, on which, with others, they had administered, but to them in the character of indorsers; whereas by not giving notice they had a right to conclude the bank intended to look to the drawer. And according to Ashurst's opinion they had a right to know from the holder, the Juniata Bank, that they intended not to give credit to the estate of John Starrett, but to look to them personally as indorsers.

The argument that the indorsers received no injury from the want of notice does not now hold. Whatever vacillation prevailed in courts for a time, it is now settled that the insolvency of the drawer of a note does not dispense with the necessity of demand and notice of non-payment. Between the parties to the notice the rule is inflexible, and it is not open to the inquiry whether notice could have availed the indorser. The holder has

1. *Ex parte Barclay*, 7 Ves. jun. 597.

no right to speculate and judge what may be the interest of the parties; his duty is a plain one—to give notice; and if that rule is dispensed with, it opens a door for endless litigation and perplexing inquiries. Death, bankruptcy, notorious insolvency, or the drawer's being in prison, constitute no excuse either in law or equity: *Gibbs v. Gannon*, 9 Serg. & R. 201 [11 Am. Dec. 699]. Notice to one of several partners who are joint-indorsers, is notice to all; and if one of the drawers of the bill be also an acceptor, and there is no fraud in the transaction, no notice in fact is necessary to the others. Neither is notice necessary to a party who by his conduct dispensed with it, as, by engaging to call on the holder and ascertain whether the acceptor has not paid the bill: *Chit. on Bills* (Carey & Lea's ed.), 297. So if the drawer of a bill promises to pay, this is a waiver of the objection of the want of notice where the party knew all the facts and legal consequences. But it has been recently held that though the drawer of a bill may impliedly waive his right of defense founded on the laches of the holder, yet an indorser can only do so by an express waiver: *Borradale v. Lowe*, 4 Taun. 93, 96, 97; *Brown v. McDermot*, 5 Esp. 265. And there is, in all those cases of want of notice, a material and essential difference between the drawer of a bill and the indorser; for if the drawer of a bill had no effects in the hands of the drawee or acceptor, and the bill is drawn for the accommodation of such drawer, he is *prima facie* not entitled to notice of the dishonor of the bill, nor can he object in such case. He, being the real debtor, acquires no right of action against the acceptor by paying the bill, and suffers no injury from want of notice of non-acceptance or non-payment (12 East, 171), and therefore the laches of the holder affords him no defense: 4 Taun. 733. But it is no excuse for not giving notice to the indorser of a bill that the acceptor had no effects: *Peake*, 202. "That circumstance," said Lord Kenyon, "will not avail the plaintiff. The rule extends only to actions brought against the drawer; the indorser is in all cases entitled to notice." See *Chit.* 259, 295.

It has been attempted to bring this within the principle of *Bond v. Farnham*, 5 Mass. 170 [4 Am. Dec. 47], and *Barton v. Baker*, 1 Serg. & R. 334 [7 Am. Dec. 620], but those cases were decided on very different grounds. In the first, Chief Justice Parsons says: "The opinion was founded on this, that if the indorser, representing himself liable for the payment of particular indorsements, receives a security to meet them, he shall not afterwards insist on a fruitless demand upon the maker, or

a useless notice to himself to avoid payment of demands which, on receiving security, he has undertaken to pay." In the latter the late chief justice put it on the ground that it was not unreasonable to suppose that the defendant took upon himself the payment of the indorsed notes, and on no other ground could it be held that the notice of non-payment was not necessary.

But here the indorsers had no security beyond any other simple contract condition of John Starrett; they obtained no advantage beyond strangers to the administration; for by the death of the intestate his goods and lands were seized by act of law, by a kind of statute execution in the hands of his administrator, just as in the case of a commission of bankruptcy, and to be discharged in a prescribed order; in which the administrator can not prefer himself or retain his own debt, as he could by the laws of England. The lands, the fund here for the payment of debts, do not come into the possession of the administrator; he has no right of entry, and can bring no ejectment; the possession descends to the heir. The executor or administrator has, by virtue of his office, in no case a right to the possession of the deceased's lands. As I do not find the case of an indorser becoming an administrator to the drawer, in any decision among the books of authority, to form an exception to the necessity of giving notice to the drawer, and as there is no reason why it should, I am not for relaxing one jot further than it has been done, this wholesome and convenient rule. Indeed, we find judges regretting that it had ever been departed from in any case.

The chief justice, who decided the case in this court, for the purpose of bringing this new question before the court, joins in the opinion of the other members of the court, that the indorsers not having received notice of non-payment, are not liable on the indorsement, and that the appeal be sustained. The rule of demand and notice is one of universal obligation. I would not extend the exceptions further than to the cases which have been expressly decided. Policy and the convenience of the public require a rigid adherence to the rule; for otherwise, exception would creep in after exception, and leave the law, which ought to be certain, open to speculation and doubt.

Judgment reversed.

Affirmed in Groth v. Gyger, 31 Pa. St. 273.

COOK v. GRANT.

[16 SERGEANT & RAWLE, 198.]

A DEVISEE WHO RELEASES ALL INTEREST under a will is a competent witness for the trustee appointed by it.

IT IS A FRAUD ON THE PART OF THE VENDOR to conceal the fact that part of the land contracted for belongs to a third person.

A COVENANT OF WARRANTY in a deed by such third person is not an execution of the contract of the vendor to convey with warranty.

THE VENDOR CAN NOT COMPEL the vendee to accept a conveyance of the land by such third person after considerable delay, where the property had greatly depreciated.

ESTOPPEL.—Where one of two persons conspiring to defraud a third, testified in the course of a judicial proceeding, that a certain contract of sale was at end, neither will be permitted to set the contract up against the other.

BILL to recover the purchase price of certain tracts of land. The opinion states the case.

Green and Mar, for the plaintiff in error, the defendant below.

Greenough and Bellas, contra.

By Court, GIBSON, C. J. William Grant was undoubtedly a competent witness. He had divested himself of all interest; and this is all that is necessary to be said in regard to the first point. As the cause is to be tried again, it will be more useful to point out the principles on which it depends, and which appear to have been misconstrued, than to enter into an analytical examination of the errors assigned in the opinion of the judge on the points made below; and for this purpose it is necessary to trace the features of the case as it appeared on the evidence.

In 1814, George Grant entered into a parol agreement with William Cook, to purchase five tracts of land, at the price of sixteen thousand nine hundred and ninety-nine dollars and ninety-nine cents; and shortly afterwards, Grant, attended by his father, Thomas Grant, and Cook, attended by his wife's father, James Lemons, met together to execute the contract. Four of the tracts were conveyed, and bonds and a mortgage executed for the purchase-money of the whole five. Why the remaining tract was not conveyed will appear in the sequel. The mortgage recites the bonds and the conveyance of the four tracts; but nothing is said of the fifth, denominated the McCully tract, as regards which the contract still rests on parol; and the action is brought on the mortgage to recover the price of the last-mentioned tract, the price of the others being nearly, if not altogether paid. Possession of the tracts con-

veyed was delivered in season, and of the McCully tract some time afterwards; Grant accepting a sum of money in compensation of the delay. At the trial, Lemons tendered a deed for the McCully tract, executed by his wife and himself, but without warranty; on which the court charged that the plaintiff was entitled to recover. Evidence of other circumstances, thought to be material, was given during the trial, and will be noticed in the course of the inquiry.

What are the principles of the action to recover the price of land? It was formerly thought that as the vendor wants nothing but the purchase-money, which may be recovered in an action of debt, his remedy is exclusively at law (Sugd. Vend. 164), and undoubtedly an action lies. But it having been thought proper to execute the contract specifically, it was supposed that justice required the remedies between the parties to be mutual and in the same courts; consequently a bill will be entertained to enforce payment of the purchase-money: Newl. Con. 91. But in an action on the contract, even the English courts take cognizance of the equitable objections: Sugd. Vend. 178; and in Pennsylvania, where we have no separate court to control the exercise of legal rights, there is still greater reason for doing so. Accordingly, in *Huber v. Burke*, 11 Serg. & R. 238, it was held that an action for purchase-money is in effect a bill in equity, the purchaser being at liberty, under the plea of payment, to give evidence of any circumstance that would actuate a chancellor to withhold his assistance. In the case before us, therefore, the action is to be viewed as a bill to execute a contract already so far executed as not to be within the statute of frauds.

The inquiry then is, whether enough has been shown to induce a chancellor to dismiss the bill. The intrinsic evidence of the transaction, as well as the testimony of Lemons himself, proves incontestably that he, and not Cook, was the actual vendor of the McCully tract. He was the owner of it, and it was well known that no one else could convey it. He also exercised a superintending power over the agency of Cook. He says he knew of the sale, and approved of it, and the reason this tract was not conveyed with the others was that Cook had contracted to sell it to Colt and he was afraid Cook might be made liable for a breach of that contract. But he wanted the purchase-money to be settled to the separate use of his daughter, Mrs. Cook. It was Lemons, therefore, and not Cook, who prevented the contract from being entirely executed at the date of the

mortgage. Last of all, he acted openly in the business, when Cook's intellects had become too weak to prevent him to act even ostensibly for himself. These, no doubt, are considerations for a jury; but at present I assume as a fact, which may be satisfactorily proved, that Lemons was the actual vendor of this particular tract; and if this be established it will be immaterial that the price of it was payable to Cook. On the other hand it is as little to be doubted that Thomas Grant, the father of the defendant, was the actual purchaser. We have then a transaction between two fathers, each treating for his child; and in equity these also are parties; so that it remains to inquire how far the acts of Lemons, as a vendor, will affect the plaintiff's title to a specific performance.

It is admitted that if Lemons and Cook acted throughout by direction, or with the knowledge and assent of the defendant, the fact would furnish a triumphant answer to every objection to the action but one; and of that I shall speak in the conclusion. But the affirmative of the proposition depends almost exclusively on the testimony of Lemons himself, whose connection with the cause is so intimate, whose bearing in the transaction is so equivocal, whose story implicates him in a conspiracy to defraud, and who is contradicted in material points by so many witnesses, that his testimony ought to be left to the jury with a direction to find for the defendant, if he were thought unworthy of credit. But if Cook concealed the ownership of Lemons, and the delusion were kept up till the mortgage was executed, the plaintiff must fail. The suppression of that fact would be a positive fraud, which, according to *Duncan v. McCullough*, 4 Serg. & R. 438,¹ would so infect the contract as to render it incapable of subsequent confirmation without a new consideration; and fraud in the concoction of a bargain is a decisive answer to a bill for specific performance. Where the contrary is not stipulated, a purchaser is entitled to the conveyance and the covenants of the vendor himself. Here the conveyance of the other tracts by Cook contains a covenant of general warranty; and if the parties intended that he should convey this tract also, it would be fair to infer that the deed was to contain the same covenant. The deed tendered by Lemons at the trial contains no covenant at all; but that is comparatively of little importance, as although the personal responsibility of Cook may have been an object of less value than that of Lemons, yet if the defendant bargained for it he is not bound to accept of anything else as

1. 4 Serg. & R. 493.

an equivalent. So that Lemons' conveyance, with or without warranty, would not be an execution of the contract on the part of the vendor.

Again: If Lemons declared at different times and on different occasions, that he had bought and paid for the McCully tract, and would keep it, that would furnish a substantial ground of objection to the action. A bill for a specific performance is an application to the discretion of the chancellor, who will not interfere where the party who seeks relief has trifled, or shown backwardness in performing his part of the agreement, especially if in the meantime a change has taken place in the situation of the parties, or an alteration in the value of the property. There must be no temporizing, but the plaintiff must show that he was always "ready, desirous, prompt and eager." If, since that time when the conveyance was to have been made, he has done any act inconsistent with the equitable ownership of the vendee, such as incumbering, he will be concluded, as in *Huber v. Burke*, 11 Serg. & R. 238. Laches *per se* may be an insurmountable obstacle; and the delay of even a few months has been a bar where there was an alteration of the value: 1 Madd. Ch. 417. If, then, the jury shall believe that Lemons withheld the title because Cook was a spendthrift, and would not be prevailed on to settle the purchase-money to the separate use of his wife, or even if without this or any other particular motive, he declared a determination not to execute the contract, he comes too late, after Cook's death has removed the cause of his repugnance, to put Cook's wife in a situation to call for the purchase-money, and compel the defendant to take the property after it has greatly depreciated.

On the other hand, there is a circumstance which is a waiver of all delay previous to the time when it occurred. I allude to the compensation awarded to the defendant in 1817 for having been kept out of possession of this tract after the possession of the others had been delivered. The acceptance of this compensation was a recognition of the contract as existing for the purpose of specific execution, but subsequent trifling or backwardness might still be set up as a defense. What passed at the settlement before Mr. Priestly and John Cook has not been disclosed, and we are unable to judge of its effect on the contract.

But there is a circumstance yet to be noticed, the effect of which I take to be decisive against the plaintiff, be the knowledge and acquiescence of the defendant what they may. An

action to recover dower in this tract was brought against Grant by the mother of Cook, and being submitted to arbitrators, came to a hearing in July, 1822. Lemons, who appeared before the arbitrators as a witness for Grant, distinctly swears that he and Grant entered into a plot to defeat Mrs. Cook, by denying the right of her son, who was then dead, to sell; Lemons declaring his own intention never to convey. Other witnesses testify that having appeared as a witness to disprove the estate of Grant, he produced his deed, and declared under the sanction of an oath, that he had bought the land and was determined to keep it. Here, again, we find him acting a part in the business for his own benefit; for Grant would undoubtedly have been entitled to an allowance out of the purchase-money, for whatever should have been recovered in the action of dower. But the circumstance most material to the inquiry is that we find him declaring on oath that he considered the contract at an end. The consequence is, that Grant and Lemons having conspired to cheat an innocent person, by repudiating the contract, shall never after set it up against each other.

The principle that a sham agreement or fraudulent representation, though absolutely void as to third persons, is nevertheless binding on the parties, is as old as the law itself. A fine illustration of it is found in *Montefiori v. Montefiori*, 2 Bl. 363,¹ a case which bears a striking resemblance to the one before us. In an action on a promissory note, the defendant was not permitted to show that it had been given to serve the plaintiff's purposes in a treaty of marriage, by giving him a false credit as a man of fortune, the balance of accounts, for which the note purported to be drawn, having no existence in fact, and this because, wherever third persons collusively represent anything in a light different from the truth, they shall be held to make it good between themselves, or to use the emphatic language of Lord Mansfield, "it shall be as represented to be." The same thing in effect was done in *Small v. Brackley*, 2 Vern. 602. And in *Bell v. Longbridge*, tried before Chief Justice Tilghman, at a circuit court for Cumberland county, held in June, 1807, at Carlisle, a judgment-creditor who had delivered to his debtor a written acknowledgment of satisfaction, while the land of the latter was in execution, and before a jury of inquiry for condemnation, was not permitted to allege that his judgment was unsatisfied. The cause was argued by able counsel, who thought proper to acquiesce in the decision. If, then, Lemons disaffirmed the con-

1. 1 W. Bl. 363.

tract, to enable Grant the more successfully to make a dishonest defense in the action of dower, he is *ipso facto* estopped from affirming the contrary. It seems to me this point removes all the difficulty by superseding every other inquiry; for if the jury shall believe that Lemons was the real party, and that he acted the part which is proved upon him by his own confession, and the testimony of witnesses, it would reflect but little credit on the administration of justice, to permit him to recover.

DUNCAN, J. delivered an opinion, *contra*.

ROGERS and HUSTON, JJ., concurred with the chief justice.

TOD, J., not having heard the argument, took no part.

Judgment reversed, and a *venire facias de novo* awarded.

Cited in *Bank v. Fordyce*, 9 Pa. St. 278, and in *Monroe v. Wallace*, 2 Pa. 173. The doctrine of estoppel here enunciated is approved in *Stewart v. Kearney*, 6 Watts, 455, and in *Ayres v. Wattson*, 57 Pa. St. 364. To show that it is a fraud for a vendor to conceal that a part of the tract of land agreed to be conveyed, belongs to a third person, *Cook v. Grant* is relied on in *Forster v. Gillam*, 13 Id. 344.

GRAHAM v. WILLIAMS.

[16 SERGEANT & RAWLE, 257.]

COMPOUNDING INTEREST.—A practice by a store-keeper to balance his books annually, and charge interest on the balance of a running account where there has been no settlement, is illegal.

APPEAL from a decree of the orphans' court. The opinion states the case.

By Court, ROGERS, J. Three exceptions have been filed to the decree of the orphans' court: 1. In not allowing interest on the account of John Patterson, as charged by him; in rejecting the interest on his account; and in not allowing interest, until three months after the last item on the debit side.

The intestate, John Williams, opened a running account with John Patterson, a store-keeper in Mifflin county. There was no final settlement in the life-time of the intestate, but Williams paid Patterson, from time to time, several sums of money. Patterson balanced his books at the end of each year, which appears to be his practice, and charged interest on the balance. Whether he allows interest is not so manifest. It is to this the

first exception applies; and there can be but little question that such a practice, if sanctioned by the court, would lead to great injustice. If there had been an express agreement between them, that would be relieved against as inconsiderate and oppressive. Thus where a mortgagee inserts a covenant in the mortgage deed, that if the interest be not punctually paid at the day, it shall from that time, and so from time to time be turned into principal, and bear interest, equity relieves the mortgagor against such covenant, as unjust and oppressive: *Sir Thomas Mears's case*, cited in *Cas. temp. Talb.* 40, 42; *Salk.* 449, and *Thornhill v. Evans*, *Atk.* 330.

Here, to make the most of it, it amounts to an implied agreement, from the practice of Patterson, and the knowledge, and therefore implied consent of Williams. Sanction this and it is made the direct interest of this class of people to encourage their dilatory customers to run up their accounts with them, knowing that until the time comes for pressing a settlement, their accounts will be drawing compound interest. When the day of settlement comes, the debtor finds himself, unacquainted as he generally is with the operation of this principle, in debt to perhaps double the amount he supposed, a judgment and mortgage is the consequence, and finally it ends in his property being sold for half its value. To protect the ignorant and unwary, public policy requires that courts of justice should put the seal of reprobation on such implied, unjust and oppressive agreements. When there is a settlement between them, and a promise to pay interest, the intention of the debtor is called to the state of the account. If he is wronged, it is his own fault; he then goes on with his eyes open. Interest, in Pennsylvania, has already been extended further than in England, or in most of the states of the Union, and it is time for us to pause and consider whether it has not been sufficiently extended.

I would wish to be considered as confining my opinion to a running account, and not interfering with the practice of dealing at six months' credit, which has generally obtained between the merchants of a sea-port and the country. It is more easy to determine what interest shall not than what shall be allowed in the case of a running account. It is usually to be left to a jury. Under all the circumstances, the orphans' court have thought that interest only should be allowed from three months after the last item, on the debit side of the count, in which there is no error.

The court, therefore, order and decree that John Graham,

surviving administrator of John Williams, pay to the legal representatives the sum of three hundred and seven dollars and fifty cents, the balance of the administration account, in his hands, not distributed; and that the appellant pay the costs of this appeal.

TOD v. GALLAGHER.

[16 SERGEANT & RAWLE, 261.]

SET-OFF OF ANY INCUMBRANCES DISCHARGED, may be made by the vendee of a tract of land in an action for the consideration-money; but he is still liable for the balance.

DEBT on two notes made by Gallagher in favor of Beale, Tod's intestate, in consideration of the conveyance of a tract of land with warranty. It appeared that after the conveyance and Gallagher's entry, an execution was levied thereon under a judgment against Beale's grantor. The defendant bought in the land at the execution sale. Plaintiff admitted that defendant was entitled to a credit for the amount of the execution, but claimed judgment for the balance. The court below directed that the plaintiff could not recover, the covenants to give a clear deed and to pay the consideration being mutual and dependent.

By Court, HUSTON, J. Seldom has a cause been before a court more defectively; the judge takes no notice of the facts, viz., that notes had been given, or that a deed had been given; but says that Gallagher was not bound to give his notes. Neither the article nor the deed are before this court; nor are they in possession of the counsel. What covenants are in the one or the other is unknown, except in the vague statement above given. It happens much too often that causes are brought before us so defectively that our decision must be unsatisfactory to a certain extent.

Whether there was any warranty in the articles, or if any, to what extent, is left too uncertain. How far the deed and notes given put an end to and extinguished the articles, is not so precisely known as could be wished; and whether the covenant of warranty in the deed was a warranty of seisin against incumbrances, or for quiet enjoyment, or all of them, is not apparent. The existing incumbrance is the alleged breach of that covenant. Now an incumbrance is a breach of such covenant, precisely to the amount of the incumbrance; if the incumbrance is two hundred dollars and the price of the land two thousand

dollars, it will not enable the purchaser, in ordinary cases, to recover back his two thousand dollars if he has paid it; or to retain the two thousand dollars if unpaid. An adverse title to the whole property may enable the party to retain all the purchase-money; an adverse title to one fourth of it may enable him to retain in proportion to its extent and value. In this case a part of the money being unpaid, Gallagher might have paid off the incumbrance and retained its amount, but no more than its amount; if the incumbrance had exceeded the money due on the whole price of the property, it might have enabled him to resist the payment of any more, or to have recovered the whole as part of what he had paid.

There may be cases where a purchaser buying property incumbered by liens not yet due, may accept a covenant against them, and agree to pay the purchase-money, although they remain a lien on the land; but where this is not expressly, or at least evidently, the contract of the parties, a purchaser may always pay off a lien and retain its amount out of the money due the vendor: *Poke v. Kelly*, 13 Serg. & R. 165. I speak of liens reduced to certainty of amount admitted and due. If the purchaser does not pay them off, but suffers the property to be sold, and it goes *bona fide* to a stranger, he may or may not be released from the payment of any more money to the vendor, according to the contract, and the facts and circumstances of the case. Here the incumbrance cost him less than he owed the representatives of T. Beale. The property is not gone to a stranger; he still has it. Justice requires he should have a credit for what this incumbrance cost him, and the same justice requires he should have credit for no more than it costs him.

Judgment reversed, and a *venire facias de novo* awarded.

Cited in *Wolbert v. Lucas*, 10 Pa. St. 75, as authority that a purchaser may pay off incumbrances on the land. In *Thompson v. Adams*, 55 Pa. St. 479, 483, the vendor of a tract of land brought ejectment against the administrators of the vendee, seeking a specific performance of a contract for the purchase thereof. It appeared that the vendee had bought in the land at a sheriff's sale, under a mortgage existing at the time of the contract for the purchase. The plaintiff's action was pronounced improperly brought for several reasons, and among others, the following was assigned: "The plaintiff below relied upon that train of cases beginning with *Tod v. Gallagher*, 16 Serg. & R., 261; followed by *Harper v. Jeffries*, 5 Whart. 26; *McGinness v. Noble*, 7 W. & S. 454; *Harrison v. Soles*, 6 Barr, 393; *Renshaw v. Gans*, 7 Id. 117; *Dentler v. Brown*, 1 Jones, 295; *Garrard v. Lantz*, 2 Id. 186; and *Mellon's Appeal*, 8 Casy, 121; which decide that a vendee purchasing a vendor's title at sheriff's sale can not withhold the unpaid purchase-money, except so much as he had expended in buying in the title. But in none of

these cases was ejectment used by the vendor to enforce the payment of the balance due to him. To suffer him to do so would contravene the theory of the action and the intent and legal effect of the sheriff's sale. The earlier cases which introduced the doctrine of equity against withholding payment, were all founded upon a note or bond given by the vendee on receiving a conveyance. The vendee it was who was driven into equity to show a failure of consideration by a sale of his title under an earlier incumbrance. Hence, when the vendee was thus forced into equity, it was thought inequitable to protect him against his obligation, beyond what it cost him to buy in the adverse title."

CIST v. ZEIGLER.

[16 SERGEANT & RAWLE, 282.]

JUDGMENT FOR THE PLAINTIFF IN REPLEVIN on the issue of no rent in arrear, is conclusive in a subsequent action of use and occupation for the same rent, if the pleadings show that a certain rent was reserved, and that the distress was made for the rent now claimed, whether the former judgment be pleaded, or given in evidence under the general issue.

ERROR to the common pleas. Case, brought by Zeigler for the use and occupation of a tract of land for five years. Pleas, *non assumpserunt* and payment with leave to give the special matter in evidence; replication, *non solverunt*, and issues. Defendants gave in evidence records of two replevin suits in which they were plaintiffs, and the present plaintiff, defendant. In those actions the defendant avowed for rent in arrear, and the plaintiffs replied no rent in arrear. On the issue joined, verdict was found for the plaintiffs. The defendants herein then contended that the judgment in those actions barred the present action. The court below was of a contrary opinion and so directed. Defendants excepted. Further instructions of the court appear from the opinion.

Bredin and Baldwin, for the plaintiffs in error.

Fetterman and Ayres, contra. A former recovery must be pleaded, or it is no estoppel: *Lansing v. Montgomery*, 4 Com. 197; Estoppel, E. Replevin is *ex delicto* and cannot be pleaded to an action *ex contractu*: 3 Wils. 240. In the replevin suit it was determined that the proper remedy was for use and occupation: 3 Serg. & R. 500.

By Court, DUNCAN, J. If the rules of pleading had been attended to in the replevin causes, and an avowry for a certain sum in arrear, there would have been no difficulty in the question; for then the causes of action, as the avowry is in the nature

of a declaration, would have appeared on the record, and the judgment, if the recovery had been for the same premises in the replevin, if pleaded in bar, would have operated as an estoppel; and if given in evidence in the general issue, would have been equally conclusive. I know there are recent English decisions, that if the former judgment is not pleaded, but given in evidence on the general issue, it is not conclusive on the general issue; yet the law appears to have been settled to the contrary by many authoritative decisions, which I am not inclined to disturb.

Whatever may be the form of action, if the original question appears to have been the same, and the same evidence will support both actions, and judgment be had on the merits, it bars all other actions for the same cause; but, from the loose, inartificial, and unsatisfactory mode of avowing generally for rent in arrear without a specification of any thing, it may or may not be that the cause of action was the same. It will be matter of evidence what was the cause of action in the former cases, matter not to be tried solely by the record, but a mixed matter, to be tried by a jury. The fact does not clearly appear on the bill of exceptions, whether or not the former judgments were because the landlord was not able to prove a certain rent which would be the subject of distress, or because he failed in his proof of a demise altogether. In one part of the bill, it would rather appear it was because no certain rent was reserved; but in another part, the court says: "The landlord has shown a parol lease to Schnee, and transferred by him to the defendants, under which they entered and occupied;" and direct the jury that the amount of rent in such lease, ought to govern them in the verdict. Now, if the defendants did enter and occupy under the parol lease to Schnee for a reserved rent, then, undoubtedly, the landlord could have distrained the defendants' goods found on the premises, and have avowed for that reserved rent in the replevin causes, and the entry and occupation under that parol lease to Schnee; in which case the former judgments would operate as an estoppel if pleaded in bar, or as conclusive in evidence, on the general issue, against the plaintiff.

A judgment in every species of action is final for its own purpose and object, concludes the subject-matter, and is a bar to further litigation, the judgment following the particular right or claim in personal actions; as here, avowry for rent in arrear, which, being in the nature of a declaration on the issue of no rent in arrear, would be conclusive evidence in every other species of action where the rent was again demanded; the ver-

dict would be a bar—call it estoppel or conclusive evidence, its effect would be the same.

The judgment is therefore reversed, and a new trial awarded, in which the parties will take care to have the facts precisely stated. The court do not wish to anticipate the final result, or give any opinion to foreclose the parties further than has been made necessary to the immediate decision, and desire both parties to understand this. The cause went to trial on a statement; this statement is entirely defective, and if objection had been taken on this ground the judgment must have been reversed, for the plaintiff has omitted to state that which is an essential part of the statement, “the whole amount which he believes is justly due to him.” How could the court, if the defendants had made default, give judgment against them for any certain sum, which is made their duty in all cases under the statement law.

Judgment reversed, and a *venire facias de novo* awarded.

RELIED upon on the following propositions: that a former judgment between the same parties upon the same subject is conclusive in a subsequent action, in *Souter v. Baymore*, 7 Pa. St. 417; that such former judgment may be given in evidence under the general issue, in *Finley v. Hanbest*, 30 Id. 194; *Man v. Drexel*, 2 Id. 209; and that parol evidence of what occurred on the first trial is admissible to explain the former record, in *Carmony v. Hooper*, 5 Id. 310; *Coleman's Appeal*, 62 Id. 273.

RES JUDICATA IN ACTIONS FOR TORTS.—See *Standish v. Parker*, 13 Am. Dec. 393, and note, 395.

HULTZ v. WRIGHT.

[16 SHERMAN & RAWLE, 345.]

PAROL EVIDENCE is admissible to show that it was the understanding and agreement of all the parties to a lease that for the last nine months no rent should be payable.

DEBT for rent, brought by Wright and Willet against Hultz. It appeared that the plaintiffs, as the guardians of Benjamin Thompson, had leased the premises to John Thompson, at a certain annual rent, for nine years. This action was for the last year's rent, Hultz having purchased from John. John and Benjamin were brothers. Their father dying had bequeathed the rents and profits of the land in question to Benjamin until he arrived of age, and then to John in fee. The defense was that for the last nine or ten months of the lease Benjamin had been of age; that Hultz, therefore, became the absolute owner

as the vendee of John's interest; and that it had been the understanding of the parties by parol agreement that no rent should be payable. The deposition of one Joseph Philips, who drew the lease, was offered to prove the understanding of the parties that no rent should be payable after Benjamin became of age, but that the lease was drawn to terminate on the first of April, as was usual. This deposition was rejected, and also a deposition of Hultz. Defendant excepted.

Selden, for the plaintiff in error, cited: 2 Johns. Ch. 593; 3 Binn. 588; 6 Id. 482; 1 Serg. & R. 466; 1 Ph. Ev. 449, 458; 2 Atk. 202; 3 Id. 388; Kirby, 399.

Burke and Fetterman, contra, cited: 13 Serg. & R. 224, 239; 1 Ph. Ev. 447; 7 Serg. & R. 60.

By Court, Tod, J. As to the deposition of James Hultz, it was well rejected. It was offered to prove declaration and assurances by John Thompson to the defendant below, that no rent would be payable after Benjamin coming of age, which clearly was not evidence. But I think there was error in rejecting the deposition of Joseph Philips. The matter of receiving parol proof in cases like this can hardly now be said to be a question for argument. It was legal evidence, and if believed by the jury, was conclusive as to the portion of rent in dispute. It was evidence to prove, not only a defect of consideration, the land during the disputed time being not the land of Wright and Willet, nor of Benjamin Thompson, but of Richard Hultz, the defendant, but to prove also mistake, or if not mistake, fraud. For either purpose it was admissible. As to fraud, it is not supposed to be necessary to have proof express that a writing has been obtained fraudulently, in order to admit parol evidence against it on that score; but parol evidence may be admitted to resist the fraudulent use of a writing, in the obtaining of which no fraud can be made to appear: See *Thompson v. White*, 1 Dall. 426 [1 Am. Dec. 252]. There appears no substantial difference between this case and the common case of defense against a bond or single bill for want of consideration, whether through fraud or mistake. The rule seems to apply here in full force to consider as paid what in justice and conscience ought not to be paid. It is the opinion of the court that the judgment be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

Cited in *Oliver v. Oliver*, 4 Rawle, 144; and *Miller v. Fichthorn*, 31 Pa. St. 261, in regard to the admissibility of parol evidence of what occurred at the time of the execution of a written instrument. The principal case is quoted in the course of the opinion of Justice Field, in *Pierce v. Robinson*, 13 Cal. 116, 128, holding that a deed absolute on its face may be proved to be a mortgage, through the medium of parol evidence.

JOHNSTON v. GRAY.

[16 SERGEANT & RAWLE, 361.]

CONDITIONAL SALE OR MORTGAGE.—Certain facts as detailed in the statement held to constitute a mortgage.

A RESTRICTION OF THE RIGHT OF REDEMPTION to the mortgagor personally is inconsistent with the nature of a mortgage, and void.

THE TENDER OF THE AMOUNT DUE on a mortgage by the assignee of the mortgagor is good, though he does not state in what capacity he makes the tender.

WHERE THERE IS NO CONFLICT of testimony, a statement of its legal effect by the court is not considered as taking the facts from the jury.

AMICABLE action instituted to decide who was entitled to the surplus after paying the judgment-creditor, arising from a sheriff's sale. The plaintiff called a witness who produced the following writing: "17 of February, 1813, articles of agreement between H. McKellip and Joseph Johnston, whereby McKellip stated he had sold to Johnston all that tract of land whereon he, McKellip, then lived, at eight dollars per acre, containing one hundred and fifty acres, strict measure, payable three hundred dollars in hand, one hundred dollars in thirty days, four hundred dollars on the second of April, 1815, and four hundred dollars on the first of April, 1816. That the said McKellip is to give Johnston unincumbered possession on the second of April, 1815. The said McKellip to enjoy the right of redemption, at any time before the second of April, 1815, and to enjoy the possession of the place to that time." Receipts for three hundred dollars at the date of the articles; one hundred dollars on the seventeenth of March, 1813; and four hundred dollars on the twenty-sixth of February, 1815. The following was then read in evidence: "17 of February, 1813, deed from H. McKellip and wife to Joseph Johnston for the same land; consideration, eight dollars per acre, or twelve hundred dollars;" describing it by courses and distances and quantity, with a general warranty, and then followed this clause: "And the said Joseph Johnston, for himself, his heirs, executors, and administrators, doth covenant, promise, grant and

agree to, and with the said Henry McKellip, his executors, administrators and (assigns), that if the said Henry McKellip, his executors, administrators or (assigns), shall and will and truly, pay well, or cause to be paid unto the said Joseph Johnston, his executors, administrators, or assigns, the just and full sum of four hundred dollars, with interest, at or upon the first day of April, 1815, with the expenses of executing this conveyance, then the above bargain and sale to be void to all intents and purposes, anything herein contained to the contrary notwithstanding. N. B. The word assigns in the fifty-seventh and fifty-ninth lines struck out before signing." Johnston did not sign this indenture; but it was acknowledged by McKellip and wife the same day, and recorded on the twenty-sixth of February, 1813.

A release from McKellip to Johnston of the equity of redemption was also produced. It was not dated, but had been acknowledged and recorded on the eleventh of May, 1814, and was in these words: "For a valuable consideration heretofore received by us from Joseph Johnston, we do hereby release all equity of redemption which we now have, or hereafter may have, of, in or to the foregoing premises or tract of land, hereby confirming and rendering the grant absolute which was conditional, so that the said Joseph Johnston may have and enjoy in the said bargained premises, an absolute and unconditional estate in fee-simple." This was indorsed on the deed of the seventeenth of February, 1813. The witness introduced four single bills of two hundred dollars each, the consideration for the release, two of them payable April 1, in 1817 and 1818, respectively; the other two payable April 1, 1999, and April 1, 2000; whether these last were executed by mistake or fraud was not agreed. Witness then produced Johnston's bond to McKellip, dated February 17, 1813, for four hundred dollars, payable the first of April, 1816, on which was indorsed: "Seventh of February, 1814, to be in force if Johnston gets my place on the second of April, 1815, otherwise to be void and of no effect." On the twentieth of February, 1815, Johnston paid McKellip four hundred dollars, the amount of his bond due April 2, 1815.

Gray's title was derived as follows: On the second of February, 1814, McKellip entered into articles of agreement with Gray, by which he covenanted on or before the twentieth of March, 1815, to convey and assure to Gray, his heirs and assigns, the same tract conveyed with a clause of redemption to Johnston. The consideration was two hundred dollars in hand, and six

hundred dollars payable on the first of April, 1815. This was acknowledged and recorded March 2, 1814. Gray tendered to Johnston, in the fall of 1814, the four hundred dollars he had paid, and again on the first of April, 1815, tendered the same and interest. It also was proved that Johnston tendered to Gray the amount he had paid down, two hundred dollars, but he refused to receive it.

The word assigns was stricken out of the clause of redemption, as the witness who drew the documents testified, because Johnston did not want a stranger to purchase. The premises in question were sold in 1817, under execution issued upon a judgment against McKellip, recovered in 1812, and affirmed on appeal in 1817. The surplus was the property in dispute.

The court charged the jury that the instrument of February, 1813, was a mortgage for the four hundred dollars then loaned, and that the clause restricting the power of redemption to the party was void.

Baldwin, for the appellant, to establish that this was a conditional sale, cited 1 Yeates, 579; 5 Binn. 499; 1 Call, 280; 2 Id. 420; 9 Serg. & R. 446; 1 Vern. 268; 8 Id. 190; Cas. in Ch. 220; 2 Ch. Rep. 26.

Forward, contra.

By Court, HUSTON, J. (after stating the two points before mentioned): The cause must eventually turn on these points, and in discussing them I shall notice some matters discussed in the argument intimately connected with, if not depending on, how these two were decided.

The rule that what is once a mortgage shall always be considered a mortgage, though stated as a general rule, will, perhaps, be found subject to several exceptions. Length of time, together with the subsequent conduct of the parties, have often varied it; but I believe it is never varied by clauses inserted in the writings at the time of the loan of money. The needy borrower is not considered as treating on equal terms with the lender; hence the lender may stipulate for the pre-emption if the borrower sells, yet he has not been permitted, at the time of the loan, to stipulate that he shall, in a certain event, become the purchaser at a price then agreed on. The whole power of the court is founded on the idea that a needy man requires protection against the effect of his own agreements with one who having the power to relieve him from present distress, was found too often to grant such relief on unconscionable terms. A com-

mon mortgage is as plain and express an agreement for an absolute sale in case the money is not paid on the day as can be expressed. Yet it has long ceased to be anything else than a security for money. And it would be an imputation on the administration of justice, if the same agreement differently expressed by the scrivener, though not more plainly, should have a contrary effect. If, then, the transaction was really a loan of money, secured on land, it is nothing more, whatever language may be used in expressing the contract, or whether that contract is all contained in one instrument, or divided in several. And, as in a plain express mortgage, the right of redemption is a right inseparable from the estate of the mortgagor, it is equally an essential right in him, though the agreement be expressed in a more complicated form and manner. The right of redemption can not be destroyed or taken away, and of consequence, can not be restrained or fettered, for if it could, it would soon cease to exist. If this be a mortgage, then, the attempt to confine the right of redemption to the mortgagor personally, as being a restraint on that right, would be void; it would, in most instances, be equivalent to denying the right altogether; it tends to disable him to borrow, and restrains his right of raising the money by sale; in short, in almost all cases, it renders the right of redemption worth nothing.

Was this a mortgage? On this it seems to be impossible to doubt. It was a loan of money. It might be paid in a day certain. But says the agreement, if not paid then, the mortgagee may pay or must pay four hundred dollars, and other four hundred dollars, and become purchaser. The mortgagee himself knows it to be only a mortgage, and treats it as such by purchasing the equity of redemption. If that had been done before the mortgagor had sold to Gray; if the eight hundred dollars agreed upon at the time of the loan, and the eight hundred dollars agreed to be given for the equity of redemption, had been paid, and a long time had been suffered to elapse, I do not say what a court would have decided, that case is not before us. If this be considered a conditional sale, in what respect would the situation of Johnston be better? The condition was performed to the letter, and in its spirit; the four hundred dollars lent was rendered before the first of April, 1815, and on that day. I do not rely solely on the phrase that McKellip should pay, or cause to be paid, though if necessary, they might be relied on. There did exist in McKellip a right of redemption; that was not taken away merely by striking out

the word assigns; and an express covenant not to raise the money by sale, extorted by a lender from a borrower, would not have availed.

Other objections are made that Gray did not state whether he made the tender in 1814, and that on the first of April, 1815, as the agent of McKellip, or in his own right as purchaser. It would be strange that a tender made by a man who had good right to make it should be considered bad because he was not asked, and did not state in what capacity he acted; as a purchaser whose title was not on record, he had a right to tender and redeem, and as he did not pretend to act in any other capacity, the tender is good. It was alleged as error that the judge told the jury that on the face of the writings it was a mortgage; and that the parol evidence, if believed by them, also made it a mortgage; and this is called taking the facts from the jury. I should not have noticed this, if the same objection had not been made in several other cases at this term. There was no contradictory statement in the testimony; and the court was bound to give an opinion on the effect of it. The objection seems to be that the judge ought to have repeated every sentence of it, and concluded each sentence: "If you believe this sentence, it is a mortgage." If he had done so, it would have been novel, and like most novelties, wrong. There may be cases where several acts are necessary to entitle a party, and where his right does not arise until he has performed each of those acts; and in such case, a judge must so direct a jury. There are other cases where the state of a single fact is to be collected from testimony; if that testimony is variant, the jury will be told the law, as it would be if the facts found in one way, and as it would be if the facts are found to be otherwise. When the evidence is all consistent and express as to facts, the only direction can be what was given here.

From the entry of the amicable action, it would seem the intention was to ascertain who had a right to the money in the sheriff's hands, but the issue is confined to the point, whether Johnston had a right to the whole of it. He claimed to be purchaser, and as such, claimed the whole. His right to the four hundred dollars originally advanced by him and interest up to the first of April, 1815, is not only admitted, but it has been actually paid him, and received without prejudice to this suit. We have been asked to give an opinion as to who is entitled to this money; this to prevent further litigation on the facts before us, and if no other facts exist, Johnston is entitled

to the four hundred dollars advanced in 1813, and interest. And on the facts in evidence, and if no contradictory facts exist, he is not entitled to receive out of the money in the sheriff's hands the four hundred dollars he had paid McKellip on the twentieth of February, 1815. He had legal notice on the second of March, 1814, that McKellip had sold to Gray; and actual notice in the autumn of 1814, by the tender made by Gray. His payment to McKellip afterwards, if not under all the circumstances fraud, was at least folly. He could not interfere with or embarrass the contract between McKellip and Gray, or acquire any further lien on the land by giving McKellip money, which he knew McKellip had no right to receive.

As to the residue of the money in the sheriff's hands, we have no facts on which to give an opinion, and we give none. McKellip is not before us; how he and Gray stand, or what at this time are the respective rights of McKellip and Gray, we know not.

The charge of the judge being correct on all the facts of the case, and the verdict conformable to the law and evidence, the motion for a new trial is overruled, and judgment affirmed.

Judgment affirmed.

Cited in *McAllister's Appeal*, 59 Pa. St. 208.

LYNCH v. COMMONWEALTH.

[16 SERGEANT & RAWLE, 368.]

SEPARATE SUITS ON A SHERIFF'S BOND must be brought by the individuals injured, except where they were parties to the original suit or claimed under them. One can not sue for the benefit of another in whose process he had no interest.

AN ATTORNEY'S AUTHORITY in Pennsylvania is more extensive than in other places. His directions to the sheriff in regard to the mode and times of sale under an execution, are a justification to the sheriff and are binding on the plaintiff.

AN ATTORNEY IS NOT LIABLE where he acts honestly, and in a way he thought was for the best interest of his client.

WRIT of error. The opinion states the case.

By Court, HUSTON, J. William Barton had obtained a judgment in the court of common pleas of Fayette county, against N. Mitchell, for eighty dollars, which he assigned to S. Wolverton, who issued execution, and for default in executing or

returning that execution the suit was brought and *narr.* filed, alleging the breach in relation to the execution for the use of Wolverton. This suit was to October, 1825; the sheriff's bond was dated in October, 1820. At January term, 1827, a motion was made for leave to amend the *narr.*, which was granted. William Barton had another suit against Mitchell, on which he had a judgment, and had issued execution to the same sheriff. This last judgment was not even alleged in the record to have been assigned to Wolverton, nor did it appear that he had any interest in it; the court below was of opinion that this proceeding was all right, and a general verdict was found for the plaintiff.

By the act of assembly, a suit can not be sustained on the bond or recognizance against the sheriff's sureties, unless the same shall be instituted within five years from the date of the bond. The act says: "Whenever the commonwealth, or any individual or individuals shall be aggrieved by the misconduct of any sheriff, it shall and may be lawful, as often as the case may require to institute actions, etc.; and if upon such suits it shall be proved what damage hath been sustained, and a verdict and judgment shall thereupon be given, execution shall issue for so much only as shall be found by the verdict and judgment with costs; which suit may be instituted, and the like proceedings had, as often as damage shall be so, as aforesaid, ascertained." By the old law, a suit was brought in the name of the commonwealth only, and when judgment was entered for the whole penalty, a *scire facias* on it issued for the use of any person aggrieved. Under this law, each individual must sue on the bond or recognizance, to recover for his own damage; no two, not parties to the original suit, or not claiming under the parties to the original suit, can join; much less can a suit originally brought by and for one only, be sued for another, or an indefinite number of other persons; especially if by such proceeding it is attempted to make the bail liable, contrary to the law limiting their responsibility to suits instituted within five years.

In the suit as instituted, William Barton had no interest, was not liable for costs, could not release it; it was Wolverton's action for his benefit; it can not be used to recover damages for Wolverton, and also for Barton, or for any other person than Wolverton, or some person claiming under or through him; much less can it be used to make the bail liable, when by law they were discharged. There was also a bill of exceptions to testimony, at a

sale made by the sheriff; he struck down an article of property to Mr. Flinn. Mr. Bouvier, the attorney of the plaintiff, and who issued the execution, came and requested Flinn to give up his purchase, and to permit the property to be returned to a Mr. Long, which was agreed to, and so done. Bouvier then agreed to take Long for the price of the articles so returned to him, and discharged the sheriff so far. This was offered to be proved by Mr. Flinn; the testimony was objected to and not admitted. In Pennsylvania the profession of attorneys and counselors at law are not distinct, the same person conducts the cause in all its stages, and it has not been considered that his authority ceases when judgment is obtained; a power of attorney is never given or filed unless demanded by the other party, which does not happen in one case of fifty thousand, and then if procured after demand, it is sufficient; the attorney is in some degree the agent as well as lawyer of the plaintiff; when execution has issued he often gives time to the defendant, and directs the sheriff to postpone a sale advertised; and, so far as I know, this has always been taken as a justification to the sheriff for not selling.

Such discretionary powers are necessary for the plaintiff's interest; without the exercise of them many times, and under many circumstances, property sufficient to pay the debt would not sell for enough to pay the costs. Although extensive authority has been exercised by the attorneys, we have had few cases of complaint, and the court has seldom been called on to state the limits of their authority, or of their responsibility to the clients; a circumstance highly honorable to the profession. To look into the practice of other countries or other states, and apply the rules adopted in other circumstances, and in consequence of different customs, would not, probably, produce a result agreeable to the principles of law or justice. If a plaintiff wishes his attorney to have less power than is usually exercised, it would seem more consonant to right to give him in writing a special and limited authority, than to bring in the law of another country, and say, in opposition to constant and general understanding, that the power of his attorney is to be judged of by that law. As between the client and the attorney I would, however, say the responsibility of the latter is as great and as strict here as in any country; I mean where want of good faith or attention to the cause is alleged; but in the exercise of the discretionary power usually exercised, I would not hold an attorney liable where he acted honestly and in a way he thought was for the interest of his client.

In the present case, if the attorney had told the sheriff to abstain from selling he would have obeyed, must have obeyed. If the attorney had bid for the property and bought it, the attorney's receipt would have been good. If Long had paid him for this article, and he had paid the money to the attorney, his receipt would discharge the sheriff. In short, the constant usage of the country justified the sheriff in the course he took; the constant usage and practice informed the plaintiff that attorneys exercised such power; the evidence then ought to have been received. If any attorney shall be guilty of unfair management; if any sheriff shall know or suspect, much more shall partake in such management, it must take the fate of all unfairness; and in case of officers of the court, I would require the strictest integrity. Here there is no allegation of fraudulent conduct or intention in the sheriff. The evidence ought to have gone to the jury.

Judgment reversed, and a *venire facias de novo* awarded.

WALTERS v. JUNKINS.

[16 SERGEANT & RAWLE, 414.]

ALTERING A VERDICT on a certificate of a mistake in rendering it, is not permissible after the verdict has been received and recorded, and the jury have been dismissed.

SUCH IMPROPER ALTERATION is the subject of a writ of error.

ERROR. The suit was brought by Junkins. After the cause was tried below, the jury retired and brought in a verdict in writing according to agreement: "We find for the plaintiff six cents damages." The court then asked if they found the defendant should pay all costs or only the legal costs, and the foreman replied: "Six cents damages and six cents costs." The verdict was recorded, and the jury formally told that they were discharged. The jury, or most of them, remained in the box while another cause was progressing. Upon a conversation between the foreman and the plaintiff's attorney it was intimated that the jury intended to find full costs against the defendant. The court then instructed the jury to retire and certify what they intended their verdict should be. They did so; and returned that their finding had been six cents damages and full costs, and the minutes were so corrected. Defendant objected.

Ramsay and Mahon, for the plaintiff in error.

Alexander, contra.

By Court, ROGERS, J. I am not aware that this precise question has been settled by any express adjudication. Several cases have arisen where jurors have been permitted to dissent from a verdict before it is received and recorded, as in the case of a sealed verdict, and this has been the practice in Pennsylvania, although regretted by some of our wisest judges. After the jury have rendered their verdict, it is read to them, that they may say whether the court have recorded it according to their finding. If any mistake should have occurred, it may be immediately corrected. To permit an alteration after the jury are dismissed, would lead to great abuses, and I am unwilling to extend the principle further than the adjudged cases. How long shall this privilege last; how draw the line of distinction, and in what manner shall we ascertain whether it be the correction of an honest mistake, or the result of improper tampering and out-of-door management with the jury? The remedy attended with the least danger is to commit the cause to another jury on a motion for a new trial. In *Root v. Sherwood*, 6 Johns. 68 [5 Am. Dec. 191], it is said there is no verdict of any force, but a public verdict, given openly in court. Until it is received and recorded it is no verdict, and the jury have a right to alter it as they may a private verdict. In *Blackley v. Sheldon*, 7 Johns. 32, the court say the law is well settled that before a verdict is recorded the jury may vary from the first offer of the verdict, and the verdict which is recorded shall stand; and there are many cases in the books of a jury changing their verdict immediately after they have pronounced it in open court, and before it was received and entered: *Dyer*, 204, e.; *Plowd.* 209; *Saunders v. Freeman*, Co. Lit. 227, e. The verdict is not recognized as valid and final, until it be pronounced and recorded in open court.

The law allows the jury all reasonable opportunity before their verdict is put on record, and they are discharged, to discover and declare the truth according to the judgment. The court may also, of their own accord, send the jury back to reconsider their verdict, if it appears to be a mistaken one, and before it is received and recorded. In 7 Bac. Abr. 9, it is laid down to the same effect; so, also, 1 Inst. 227, and P. Wms. 211. Although these cases do not expressly determine the point, the inference is irresistible that where the verdict is received, recorded, and the jury dismissed, as here, they have not the power to alter their verdict.

It is objected that this is not the subject of a writ of error.

The whole matter has been fairly stated on the record by the president of the common pleas, from which it appears to the court that there was no authority to render judgment on the second finding of the jury. It was the ground for a motion in arrest of judgment, or for a writ of error to this court.

Judgment reversed.

This case is pronounced decisive of the point it considers, in *Wolfrau v. Eyster*, 7 Watts, 39; *Reitenbaugh v. Ludwick*, 31 Pa. St. 141, and in *Blum v. Pate*, 20 Cal. 71.

CHAHOON v. HOLLENBACK.

[16 SERGEANT & RAWLE, 425.]

PURCHASERS AT EXECUTION SALES against vendor and vendee respectively, stand in the relation of vendor and vendee with their respective rights and liabilities.

A SCIRE FACIAS TO REVIVE a judgment should name the terre-tenants, or the sheriff's return should state that the parties notified were the tenants, and whether of the lands bound by the judgment.

OMISSION TO NAME SOME OF THE TENANTS in the writ is pleadable in abatement.

MERE OCCUPANTS are not terre-tenants; those only who are owners of the fee are such.

APPEARANCE—A motion by an attorney to set aside a judgment taken by default is not an appearance for the party.

UNDER A SCIRE FACIAS TO REVIVE A JUDGMENT those only can claim as tenants who became such by conveyance subsequent to the judgment.

TENDER MUST PRECEDE SUIT where the plaintiff relies on an equitable title under a contract for conveyance.

TENDER OF MONEY DUE THE BENEFICIARY should be made to the trustee.

COMPROMISE OF A DOUBTFUL RIGHT is sufficient consideration to support an agreement.

ERROR to the court of common pleas. Ejectment. The case appears from the opinions, the facts being detailed by Judge Huston.

Verdict and judgment for the plaintiff below.

Dennison, for the plaintiffs in error.

Conyngham, contra.

By Court, GIBSON, C. J. Under the Susquehanna company the title to the premises was in Gore, from whom Duane acquired an equitable title by a parol contract, in part executed by delivery of possession and payment of a portion of the purchase-money. When the Connecticut claimants came to receive their titles from Pennsylvania, Gore, by agreement with Duane, ob-

tained the patent in his own name, but in fact as a trustee for Duane. The plaintiff below claims as a purchaser of the equitable title for Duane at sheriff's sale; and Chahoon, under whom the other defendants hold claims under a conveyance of the legal estate from Gore; so that the parties stand in the relation of *cestui que trust*, and trustee, the former demanding, and the latter resisting a specific execution of the trust.

In this view it is plain that the points which were made in relation to the supposed expiration of the lien, and the revival of it in 1811, were irrelevant. This court has held that the legal estate may be bound by a judgment against one, and the equitable estate by a judgment against another; and that the interest of either may be transferred to a purchaser at sheriff's sale. Thus two purchasers, the one under a judgment against a vendor after articles for a purchase, the other under a judgment against the vendee, will stand in the relation of vendor and vendee, with all the rights and remedies which those whom they represent could have claimed or exercised against each other. The reason is that a judgment against a vendor binds not only the legal estate, but the beneficial interest that remains in him, which of course is an interest in the land to the amount of the unpaid purchase-money; and a judgment against the vendee binds only the interest for which he has paid. The true question, therefore, was whether the sheriff's deed had transferred the equitable estate of Duane. And it undoubtedly had, even though the lien of the judgment were expired, unless, indeed, Duane had conveyed it away previously to the levy, which was not pretended. A purchaser at sheriff's sale can be implicated in the consequences of having suffered the judgment to expire only in a controversy with a purchaser from the debtor by a conveyance previous to the levy; in a controversy between judgment-creditors, the only remaining case in which a question of the sort can arise, he can not be implicated at all. Much less can a party who claims not under the title of the debtor, but adversely to it, derive an advantage from the expiration of the lien, it being sufficient for the purposes of the purchaser that the sale and conveyance of the sheriff has vested in him the estate which was in the debtor at the time of the levy. In regard to these immaterial points, therefore, it is unnecessary to inquire whether the direction given were erroneous in the abstract or not, as it can not in any event be used to the prejudice of the defendant in error.

The regularity of the proceedings on the *scire facias* to No-

vember term, 1812, may be doubted; but they are sufficient to support the execution. The writ was issued against Duane and "terre-tenants," without naming them, which is the preferable course; and the sheriff returned that he had given notice to George Chahoon, Eleazer Lake, Agar Hoyt, and Christian G. Voerhing, without returning expressly, as he ought to have done, that they were terre-tenants in fact, much less that they were the terre-tenants of all the lands that were bound by the judgment. Duane was served by the present plaintiff under a special deputation; and at the return of the writ, judgment was signed against all by default. At the next term, this judgment was set aside at the motion of Mr. Evans, who entered no appearance, and took no further part in the cause; and at the term succeeding, Mr. Ross appeared, as it is expressed, for Matthias Hollenback, the landlord of the terre-tenants, and pleaded to issue, and it was found for him; whereupon judgment was rendered on the verdict in favor of the terre-tenants, and by default, against Duane.

The plaintiff below was the party beneficially interested on the judgment, and also the purchaser under it at sheriff's sale; and the plaintiff in error availing himself of this circumstance, objects that all the defendants are not disposed of on the record, judgment not having been rendered expressly against George Chahoon, for whom it was said Mr. Evans appeared. But Mr. Evans did not appear at all. While the judgment by default remained in force, the cause was at an end, and no appearance could be received; and after it again became a cause depending, Mr. Evans did not think proper to appear. It is absurd, therefore, to speak of his motion as an appearance. Chahoon did not appear specially; and as he can not be distinguished from the other defendants who appeared along with their landlord, Hollenback, he may be considered as disposed of by the judgment in their favor. We ought to favor every intendment in support of a judgment, rather than defeat the party on technical grounds, by laying hold on an ambiguity arising from the shortness of our entries, and the looseness of our practices, especially where, as here, no one who ought to have been heard, can be prejudiced. The persons summoned were in fact not terre-tenants, nor were they expressly returned as such, and the return was ill, as well for this cause, as for want of an averment that they were terre-tenants of all the lands that were bound: 2 Saund. 7, n. 7. For being entitled to contribution among themselves, all must be named; and, therefore, if the

plaintiff attempt to name them in the writ, and omit the name of some of them, the admission may be pleaded in abatement: Id. n. 10. But they were in fact not terre-tenants, because they were only occupiers, and not owners of the fee: Id. n. 9. At all events, none of them was a terre-tenant to Duane; for none derived title from him by a conveyance subsequent to the judgment, or had an estate that was bound by it; and none else is entitled to notice on a *scire facias*, for none can interpose between a judgment-creditor and his right to satisfaction by execution, but one who may be prejudiced by the judgment. Hollenback, and those who came into possession of the premises claimed by him, had a verdict, because he derived title by a conveyance which was previous to the judgment; and Chahoon, although having entered originally under Duane, now claims adversely by a conveyance from Gore. On this defective return, then, we ought not to treat as parties, persons who do not distinctly appear to have been treated as such in the court where the action was pending; nor even if they had been, ought we to favor an intendment against the regularity of the proceedings for want of disposing of them when they ought never to have been brought on the record at all. But here the most natural conclusion is that Chahoon appeared and pleaded along with the tenants of Hollenback.

On the next point the judgment is to be reversed. The jury were informed that before the necessity of a tender could be urged, it ought to appear that a particular sum was due, and that there was some person to whom it might have been tendered; and, further, that a tender was a condition precedent to recovery of the possession. Although this be true in the abstract, yet viewed in relation to the evidence, it had a tendency to mislead. The trust was established by the admission of Gore, who at the same time declared that one hundred or two hundred dollars were due from Duane, and to go to Avery Gore and John Shepard's children; and as these children may have been minors without a guardian, and, therefore, without capacity to receive, the jury might naturally suppose they were alluded to as persons entitled to receive, taking their capacity for granted; consequently that the want of such capacity would excuse the tender altogether. But there was no room for uncertainty on this head. The trustee in his life-time, or his personal representative after his death, was obviously the person to receive the purchase-money, and see to its application, a matter with which the *cestui que trust* had nothing to do. The jury may also have

been induced to think, that under all circumstances, the necessity of tender was not clearly established, for the court certainly treated that as a matter resting in contingency; whereas, payment of the purchase-money, and the conveyance of the title are, in all cases where the contrary had not been stipulated, mutual conditions, which the parties are bound respectively to observe before calling for a specific execution of the contract; and with us, as was held in *Wolfley v. Snyder*, 8 Serg. & R. 328,¹ where the plaintiff relies on an equitable title, the tender must precede the action.

The remaining exception is not sustained. The original rights of the parties were given up for those which they acquired by the agreement to take out the title in a particular way. Duane might have contested the title before the commissioners, and if he had succeeded in obtaining the certificate and patent in his own name, Gore would have been concluded; but his right to do this was parted with for the terms of the agreement. Now if this right was not a doubtful one, and it certainly is far from being clear, that the original contract was within the statute of frauds, there is nothing in the point that was submitted; but even if it were doubtful, still the compromise of a doubtful right is a sufficient consideration to support an agreement. The original rights of Connecticut claimants have never been inquired into as between themselves; the courts never having gone further than to recognize a trust by agreement of the parties when the title was acquired under Pennsylvania; but where such a trust has been proved, it has been executed according to the conditions and limitations of the contract.

HUSTON, J. Blackburn obtained judgment, on the fifteenth of October, 1806, with a stay of execution till the first of March, 1807. His administratrix issued a *scire facias* against Duane and the terre-tenants, to November term 1811, which was returned, served on G. Chahoon and several others, and served on Duane in Oswego by J. H. deputed for that purpose. Judgment generally opened, and a trial for defendants, terre-tenants of M. Hollenback, and verdict for them. It is admitted on both sides that Chahoon was not one of them. Judgment for them not to prejudice the plaintiff against other terre-tenants. Judgment against Duane by default, on the twenty-fifth of October, 1813. To November term, 1815, a *scire facias* by Blackburn's administratrix against Duane and terre-tenants. This *scire*

1. *Snyder v. Wolfley*.

facias refers to the first judgment in 1806, and recites it, it does not notice the *scire facias* of 1811. It was returned *nihil*. No terre-tenants named in the writ or return. To April, 1816, another *scire facias* between the same parties. This writ issued on the nineteenth of February, 1816. The writ is not here; it was returned *nihil*. And on the ninth of April, 1816, judgment. *Fieri facias* to August; land levied and condemned. *Venditioni exponas* to August, 1817; sold. *Fieri facias* to November, 1821; levied on houses and lots in question, valued at two thousand four hundred dollars; and on a *venditioni exponas* to August, 1822, sold to J. H. for fifty dollars.

It was proved that Duane made the first improvement on the lot; that Chahoon lived there at the time of the judgment, and ever since; that Chahoon was Duane's tenant in 1806 and 1807, till April 1, 1808; but never was after; that he then leased from O. Gore; that Duane demanded no rent since 1807; that the house then rented for ninety dollars, and was much improved since; that Hollenback, as agent for Duane, settled with Chahoon about 1820, and demanded no rent after 1807; that there was a suit between Duane and Chahoon, and Hollenback was agent for Duane; that Hollenback has paid most of this judgment to Blackburn's attorney; that Blackburn revived this judgment, had *scire facias* issued and executions; that neither Blackburn nor his agent had any thing to do with these *scire faciases* and executions, but expressly refused; that the judgment was now assigned to Hollenback; but that he, as agent for Duane, or for some other reason, has paid off the greatest part of it. It further appeared that under the compromising law, O. Gore returned this, with other property, to the commonwealth, and returned a certificate for it, and in 1805, a patent from this state. This patent was conclusive against all commonwealth claims.

It appeared that in 1806, O. Gore had stated to different persons that he held the lot in question for Thomas Duane, and was ready to convey to his assignee on receiving about two hundred dollars, but how this was due did not appear; it appeared that the title was taken to Gore, in pursuance of some agreement between Duane and Gore. How Chahoon ceased to be Duane's tenant and leased from Gore was not explained; but it appeared that Duane never claimed any rent from Chahoon after he had leased from Gore. In 1811, Chahoon bought from Gore. I lay the *scire facias* of 1811 out of the case, because no judgment was had on it against Chahoon, and no legal one against

Duane; the service on him in York state was void. If it was not, this judgment was still irregular; he should have been ruled to plead; and as no judgment was obtained against Chahoon, no subsequent *scire facias* could affect Chahoon, founded on the judgment on this *scire facias*. In fact, the *scire facias* in 1815 pays no regard to this, and recites the judgment in 1806.

I think the lien of the judgment in 1806 was gone as to this lot, if Chahoon is a purchaser, either mediately or immediately, from Duane, whether Duane sold his equitable interest to Gore, and Gore to Chahoon, or whether Gore conveyed the legal title, and he and Duane divided the purchase-money; but the fact that Duane ceased to claim or demand rent, and perhaps other facts, would seem evidence of Gore and Chahoon having Duane's equitable interest. And if the jury should believe Chahoon stands in the light of a purchaser from Duane, whether of a legal or equitable right, it seems to me the act equally requires that *scire facias* should be served on him, or the lien of the judgment is gone. If the *scire facias* in 1811 is still undisposed of, the whole proceedings on the subsequent *fi. fa.* of 1815, are at least, as respects Chahoon, null and void, and the sheriff's sale vested no title against him in J. H. If the verdict and judgment for the defendant included him, he is equally safe. It seems to me strange to consider Chahoon as still the tenant of Duane after 1807, in opposition to positive proof that he was not, and that Duane did not even allege that it was. The fact whether he was a tenant or a purchaser is necessary to be ascertained. If a tenant, as he attorned to Gore without the consent of Duane, a *scire facias* perhaps need not to be served on him; but if Duane released to Gore, and Chahoon, by his direction, became the tenant of Gore, and afterwards his vendee, the *scire facias* must have been served on him, or the lien was gone. For it is admitted that he resided constantly in the house, in sight of the court-house. I think it was necessary that the jury should find the fact whether he was a purchaser or not; if they found he was a purchaser, the lien is gone.

The fate of the act of 1798, on the lien of judgments is singular. In *Young v. Taylor*,¹ an opinion of a single judge, entirely extra-judicial, made a strong impression, but it is entirely an *obiter dictum*. The sheriff's deed was not acknowledged, and so far from deciding that Young's lien on the lots was preserved, they recommend further proceedings to bring

1. 2 Binn. 218.

the matter before the court in such shape as that his right may be decided. The very point of the construction of this act came before this court in *The Bank of North America v. Fitzsimmons*, 3 Binn. 342. It is there said, nothing can be more plain than this law. That no inconvenience will result from the law, but on the contrary, it will promote the public convenience. The dictum of Judge Yeates was repeated again in *Lewis v. Smith*. But in that case it was impossible to apply it to the matter before the court, for the levies were on personal property. There have been several cases since, in the last of which it is said expressly, the court will not decide whether an execution will retain the lien of a judgment, except as to the lands on which it is levied.

In *Young v. Taylor*, the plaintiff had proceeded so irregularly that the court refused to permit his deed to be acknowledged; there, also, the real plaintiff, the man who managed the suit, is the purchaser. At one time he notifies Chahoon but obtains no judgment against him. He afterwards issues a *scire facias* on the judgment of 1806, and takes care not to notify him. He gets his judgment of Duane revived, leaving the suit which was to decide whether Chahoon's house and lot were liable undecided. He sells in this uncertainty, and himself purchases, for five hundred dollars, property which rented at ninety dollars per annum ten years before, which had cost fifteen hundred dollars, and which twelve men on their oaths said was worth two thousand four hundred dollars. He obtains this monstrous advantage by his own misconduct. For we must suppose if he had tried his *scire facias* of 1811, and a court and jury had decided that the property was subject to the lien; it would have sold for twenty times as much as it has been sacrificed for. I am not speaking of a case where a third person purchases at sheriff's sale, but of a case where the plaintiff, or his agent, purchased after having proceeded with such irregularity as to deter prudent men from bidding against him. To make any intendment in favor of such a purchaser would be to assist him in his oppression. For this reason, also, I think the cause ought to be reheard.

Judgment reversed, and a *venire facias de novo* awarded.

Cited in *McLanahan v. Wyant*, 1 Pa. 113, that if the plaintiff undertakes to name the terre-tenants, he must name them all; in *Catlin v. Robinson*, 2 Watts, 379; *Stewart v. Coder*, 11 Pa. St. 94; *Garrard v. Lautz*, 12 Id. 193, that the legal estate of the vendor or the equitable estate of the vendee may be bound by a judgment against the one or the other; in *Commonwealth v. Lelar*, 13 Pa. St. 29; and in *Fox v. Seal*, 22 Wall. 441, in respect to who are terre-tenants under the act of 1798.

CHANCERY CASES
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

SIMS v. CAMPBELL.

[1 McCORD CH. 53.]

SHERIFF IS THE AGENT OF THE LAW, and not of the execution-creditor, except for certain purposes, and the latter is bound by his acts only within his lawful authority.

SHERIFF CAN MAKE NO COMPROMISE to the plaintiff's prejudice.

PRESUMPTION THAT ACTS DONE IN THE SHERIFF'S OFFICE were done by his authority may be rebutted.

EXECUTION INDORSED "SATISFIED" IN THE SHERIFF'S OFFICE may be shown not to have been fully paid, and will retain its lien for the unpaid balance as against other creditors.

JUDGMENT LIEN COVERS INTEREST as well as principal.

APPEAL on a motion by the plaintiffs, junior creditors of one Rochelle, to set aside the chancellor's order to pay the balance due on the defendants' prior judgment against Rochelle out of the proceeds of the sale of certain mortgaged property, notwithstanding an indorsement of "satisfied" appearing on an execution on said judgment. The opinion states the material facts.

W. Thompson, for the appellants.

J. Johnston, contra.

By Court, NORR, J. This question appears to me as plain as a self-evident proposition. It is admitted that the plaintiff in the execution has the oldest claim; that he had indeed the first lien on the property, a lien which even the sale under the mortgage could not defeat. It is not pretended that it has been actually paid. The debtor himself acknowledges that the balance

now claimed is still due. No fraud is alleged against the party or the sheriff. But some technical rules are attempted to be set up as a bar to the plaintiff's acknowledged right. First, it is said the sheriff is the agent of the plaintiff, and, therefore, he must be bound by his acts. Secondly, this act having been done in the sheriff's office, it must be presumed to be done by his authority. The sheriff is, for certain purposes, the agent of the plaintiff, but he is not an agent of his own appointment. He is the agent of the law, and the party is no farther bound by his acts than as they come within the pale of his authority. If he recover money on an execution it will discharge the debtor, because the law has reposed that confidence in him, and not because he is the agent of the creditor. But he can make no contract or compromise to the prejudice of the plaintiff. Nothing but actual payment will discharge the debt, because his authority extends only to making of the money. It is true that whatever is done in his office bearing the marks of official authority will be presumed to have been done by his orders or approbation. But like every other presumption, it may be rebutted by stronger evidence. Mistakes may be explained and errors corrected in a sheriff's office as well as elsewhere. Now, what is the fact in the present instance? The word "satisfied" is found written on an execution. It is equivocal at best, because it does not show in what manner it has been satisfied. It is not pretended to be in the handwriting of the sheriff, nor does it appear to be by his authority. It was, therefore, open to explanation. Suppose the sheriff had actually received the money and entered satisfaction in due form, and it had afterwards turned out that the money was counterfeit, or had been taken away by an older execution, would it have been a bar to another execution? Most unquestionably not. There is no doubt, therefore, of the correctness of the order. Even if we put the parties on the ground of two innocent sufferers, as the counsel has called them (which I do not think a correct position in this case), still he who has the legal priority will be entitled to hold it. It has been contended farther that if they were entitled to receive the debt they were not entitled to interest. To that part of the case it is sufficient to say that the confession of judgment contains an agreement to pay interest. The debtor makes no objection, and it does not belong to third persons to say that they may not contract for themselves.

Motion refused and decree affirmed.

RHAME v. RHAME.

[1 McCord's OBL., 197.]

ALIMONY —Courts of equity have jurisdiction of cases of alimony.

ALIMONY WILL BE ALLOWED in cases where the defendant has inflicted personal violence, endangering life, health or limb, or where he has used words of menace, importing actual danger of bodily harm.

ALIMONY WILL NOT BE GRANTED for what merely wounds the mental feelings, unless accompanied with bodily injury, actual or menaced; nor will it be granted where the complainant has indulged in recrimination or retaliation, or purposely provoked the defendant.

LEGAL CRUELTY.—Harshness of temper, petulance of manner, rudeness of language, a want of civil attention and accommodation, and even occasional sallies of passion, unless they threaten bodily harm, do not constitute legal cruelty.

RESTITUTION TO CONJUGAL RIGHTS.—In England, courts of equity will, in proper cases, decree restitution to conjugal rights, and enforce their decrees; but it seems that courts of equity in this state do not possess any such power.

ACTUAL DESERTION OR ABANDONMENT of the wife by the husband, is, in England, a good ground for restitution, but not for alimony; in this country, contrary to the English rule, it seems such desertion would be a good ground for alimony.

WHERE THE DEPARTURE OF THE WIFE IS VOLUNTARY, she is not entitled to alimony.

DECREE FOR RESTITUTION to conjugal rights can only be made on a bill brought for that purpose, and such decree must not be in the alternative.

THE JURISDICTION OF COURTS OF EQUITY in this country is confined to allowing alimony, and to the granting of orders necessary to the enforcement of such a decree, and the alimony is usually allowed until the husband agrees to take back the wife and treat her properly.

BILL in equity filed against the husband to obtain alimony. The bill stated that the complainant intermarried with the defendant, having at the time of her marriage, an estate valued at from eight thousand dollars to ten thousand dollars; that very soon after the marriage the defendant began to treat her unkindly, and, by continued ill usage, forced her to leave him and take refuge among her friends, upon whose bounty she was now entirely dependent; she alleged that she had always been an affectionate wife. The bill further charged that the defendant was in possession of the property which she had brought to him at her marriage, and that he had refused to allow her anything for her support and maintenance.

The defendant in his answer denied the charge of cruelty, and alleged that complainant was, at the time of her marriage, afflicted with a nauseous and unchaste disease, and that she had

left him without any cause. He also alleged that her debts had consumed all the property that he had received with her, and denied that he ever refused to maintain her if she would come and live with him.

Witnesses were examined on the part of the complainant, who testified that she had gone to the house of the defendant and asked him to give her something for her support. That he refused to give her anything, or to let her live in the house with him, but said he would build her a house in the corner of his field. That defendant treated her contemptuously, and charged her with living in debauchery; and she charged him with vicious conduct. One of the witnesses for complainant also testified that defendant was not a faithful husband; but several witnesses for the defendant testified to the bad moral character of this witness.

Witnesses for the defendant testified that he had used the complainant kindly, and that he was a man of good character and correct life. That complainant had told them that she had gone to defendant's house for the purpose of provoking him to use her ill and to drive her away. The property that she had brought to her husband had been sold to pay the debts of her former husband. The family physician also testified that he had been called to attend the complainant, whom he found suffering from syphilis.

The chancellor made a decree ordering the defendant to forthwith receive the complainant, and treat her kindly and respectfully as the head of his family; or, if not disposed to do that, to make immediate provision for her comfortable subsistence, and until this be regularly done to pay quarterly the sum of forty-five dollars. Both parties appealed from the decree.

Preston, for complainant.

Miller, for defendant.

By Court, NORR, J. That the courts of equity in this state have jurisdiction of cases of alimony is now settled by the long practice of the court: *Prather v. Prather*, 4 Desau. 33. From necessity such jurisdiction must exist somewhere; and there is no tribunal in the state where it can be so well exercised as in that court. It belongs to the ecclesiastical court in England; but we have no such court in this state. And even in England during the revolution, when the ecclesiastical courts were shut up, the courts of equity took cognizance of such cases: 1 Madd. Ch. 386. In the exercise of this power, however, there is no

little difficulty in determining the extent of the jurisdiction. The first question presented in this case is, whether the complainant is entitled to alimony.

In England it appears that alimony is allowed only where a separation is decreed. And although our courts of equity have not the power to grant divorces, yet as the two subjects, "divorce and alimony," are inseparable companions in England, we must look to the causes of divorce to ascertain the grounds on which alimony will be allowed. Sir William Scott (now Lord Stowell), in the case of *Evans v. Evans*, 1 Hag. Con. 39, which was an application for a divorce on the ground of cruelty, says: "In the oldest cases of this sort which I have had the opportunity of looking into, I have observed that the danger of life, limb or health is usually inserted as the ground on which the court has proceeded to a separation. This doctrine has been repeatedly applied by the court in the cases that have been cited. The court has never been driven off this ground. What merely wounds the mental feelings is in few cases to be admitted where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manner, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty."

The same learned judge, in the case of *Oliver v. Oliver*, 1 Hag. Con. 364, says: "Words of menace, importing actual danger of bodily harm, will justify the interposition of the court, as the law ought not to wait until the mischief is actually done. But the most innocent and deserving women will sue in vain for its interference for words of mere insult, however galling; and still less will that interference be given if the wife has taken upon herself to avenge her own wrongs of that kind, and to maintain a contest of retaliation." And it appears to me that our courts have hitherto acted upon the same principles. The case of *Jelineau v. Jelineau*, 2 Desau. 50, appears to be the first reported case which occurred in our courts. The evidence in that case is not so fully reported as to give us a very distinct view of the facts. It appears, however, from the decree, that the husband had never used personal violence towards his wife, but he had threatened to do so; and had, in other respects, treated her in a cruel and brutal manner. And words of menace, importing actual danger of bodily harm, will justify the interposition of the court. The cases of *Prather v. Prather*, 4 Desau. 33; *Duvall v. Duvall*,

Id. 444;¹ *Taylor v. Taylor*, Id. 165; and *Threewitz v. Threewitz*, Id. 560, are all cases of personal ill usage. The case now before us furnishes no such ground for the interposition of the court. No personal violence has been used, no harsh language indeed, nor unkind treatment, which the complainant has not brought upon herself by her own improper conduct. This court, therefore, concur with the chancellor that the complainant did not make out a case of alimony.

This brings us to the question submitted by the defendant, to wit: Whether the court ought not then to have dismissed the bill. In England actual desertion or abandonment of the wife by the husband, except in particular cases, will not be a ground for alimony, unless accompanied with cruelty: 1 Const. Rep. 120. But the court will grant a restitution of conjugal rights. That court has the power, and will compel the husband to take the wife back and treat her with kindness. But in those cases there is no such alternative provision as is made in this case; for that would leave it optional with the husband whether to perform the decree or not. The court, therefore, decrees restitution unconditionally, and will compel obedience to its decrees. If the chancellor intended this as a decree of restitution there ought to have been no alternative. But it does not profess to be such, and I do not know that a power has ever been exercised by the court of equity in this state. I am disposed to think, however, that a bill for that purpose would not be entertained. I therefore presume that desertion or abandonment of the wife by the husband would be a good ground for alimony, contrary to the English rule. There must be some method by which the husband may be compelled to maintain his wife; and when restitution of conjugal rights can not be decreed, alimony must. And even in England, where the abandonment is such that the party can not have relief in the ecclesiastical court, the court of equity will interfere. And, therefore, in the case of *Colmer v. Colmer et al.*, Mosely, 119, where a husband had left the kingdom and gone to the state of Maryland, having first made a fraudulent assignment of all his real and personal estate in trust to pay his debts, the court decreed the wife a maintenance out of it.

But that will not avail the complainant in this case; for it was proved, and so expressly stated in the decree, that the departure of the wife was voluntary. But if the court actually possessed the power to decree a restitution of conjugal rights, it could not be exercised on this occasion. It must be on a bill

1. *Devall v. Devall*, 4 Deas. 79.

brought expressly for that purpose. Lord Stowell, in the case of *Evans v. Evans*, which was a case for a divorce, adverts to a case for restitution of marital rights, and says: "The monition is not only that he shall take her back, but that he shall treat her with conjugal kindness." Yet, in a subsequent sentence, a few lines below, in the same case, he says: "It is a mistake to say that in the present suit I can issue a monition to either party to return. This suit can lead to no such sentence." And in the conclusion of his opinion (p. 129), after having made several pertinent observations upon the reciprocal duties of husband and wife, he says: "But in taking this review, I rather digress from my province in giving advice. My province is merely to give judgment; to pronounce upon what I take to be the result of the facts laid before me." His lordship, therefore, concluded with dismissing the parties. Lord Hardwicke, in the case of *Head v. Head*, 3 Atk. 547, has, in his decree, made terms somewhat similar to those made in the decree now under consideration. But that was on a bill brought by the wife for the arrears of an annuity, which the husband agreed to pay during their separation. The husband agreed to receive her back again. The lord chancellor decreed that the annuity should cease upon his receiving her back, and maintaining and treating her as his wife; otherwise that it should continue. But that was merely requiring his promise to be performed with good faith, as a condition upon which he should be exempt from paying the annuity. If the defendant was now asking to be relieved from paying alimony upon receiving his wife back, whom he had driven from his house, such a condition might be proper. But the chancellor has decreed, and this court concur with him, that the complainant is not entitled to alimony; and that was the only question submitted to the court. The complainant does not ask her husband to take her back. She does not appear to wish it. On the contrary, her object was to provoke him to turn her out of his house. But as she could not bring him up to such a pitch of excitement, she concluded to abandon it herself.

I am of opinion that the jurisdiction of the court must be limited to the allowing of alimony; and to such orders as are necessarily incident to the effectual execution of such a decree. Alimony is usually allowed until the husband shall agree to take his wife back, and treat her with conjugal affection. Whenever the husband professes to have complied with those terms and comes to be relieved from the payment of alimony,

the court will grant the relief upon his faithfully performing the condition. In those cases, and those only, can the court impose the terms made in this decree.

All that part of the decree, therefore, (after declaring that a case has not been made out to justify the court to give the relief demanded) must be reversed. That part of the decree, which refuses the complainant the relief demanded, is affirmed. The bill is, therefore, dismissed.

Decree modified.

Cited in *Galland v. Galland*, 38 Cal. 270, and cited and explained in *Hair v. Hair*, 10 Rich. Eq. 172. In *Fischli v. Fischli*, 12 Am. Dec. 251, it was decided that, independently of statutory authority, equity has no original jurisdiction to entertain a suit for alimony. See the note to that case and the authorities therein cited for a full discussion of the jurisdiction of courts of equity in cases of alimony.

SIMPSON v. FELTZ.

[1 McCORD'S CH., 213.]

WHAT CONSTITUTES A PARTNERSHIP.—If a person is to receive for his services emoluments depending upon the profits and losses of the trade, he is to be considered a partner; but if he is to receive a certain and definite portion of the profits, he is not a partner.

LIABILITY OF PARTNER FOR LOSS BY FIRE.—A partner entitled to receive a share of the profits, must bear his proportion of a loss occasioned by fire.

WEIGHT OF EVIDENCE.—Mere opinions founded on data that do not justify the conclusions reached, can not outweigh the positive statement in the answer of a defendant who had positive knowledge of the facts alleged.

WHEN INTEREST ALLOWED.—Where one has retained money belonging to another, it is presumed that he kept it for the purpose of profit, and he must, therefore, pay interest on it.

BILL for an account and settlement of a copartnership as merchants. Two points arose: 1. As to the quantity of cash received by the defendant; 2. Whether defendant was a partner or only a clerk. The complainants established a store and furnished the goods. The defendant was to give his personal services in managing the whole concern, for which he was to receive one third of the profits realized.

The defendant, in his answer, swore positively that he did not receive more than from two hundred to two hundred and twenty dollars in cash, during the time that he had charge of the store. Several witnesses for the complainants swore that they kept store, in that part of the country, and, from their knowledge of the place and business of the defendant, and from a comparison

with their own business, the defendant ought in that period to have received nine hundred and fifty dollars. No cash-book was produced, as it was alleged to have been burned with the store.

The next question was, whether the defendant was liable with the complainants for the loss of the goods accidentally burned in the store. He contended that he was not a partner, and, therefore, not liable for any accidental loss.

The commissioner reported against the defendant on both grounds, deducting the loss of the goods before allowing the defendant credit for his one third of the profits, and charging him with the nine hundred and fifty dollars cash.

The defendant excepted to the report on the grounds that the commissioner ought not to have allowed more cash than was set forth in the answer, which had not been contradicted by sufficient evidence; and that defendant was not a partner and, therefore, not liable for the loss by fire. The complainants also excepted to the report on the ground that interest ought to have been allowed on the balance from the time the moneys had come into the hands of the defendant. The chancellor sustained the exceptions of the defendant, and overruled the exception made by the complainants. From this decree the complainants appealed.

Dunlap, for the appellants, contended that the court erred in overruling the commissioner's report allowing the nine hundred and fifty for cash sales, as the evidence sufficiently contradicted the answer. That the defendant was a partner and ought to bear his proportion of the loss, and that interest ought to have been allowed to the complainants.

Fanow, *contra*, cited 1 Mont. on Partn. 11, 12; Gow. on Partn. 15; *Grace v. Smith*, 2 W. Bl. 998; *Muzzy v. Whitney*, 10 Johns. 226; *Cheap v. Cramond*, 4 Barn. & Ald. 663; *Walden v. Sherburne*, 15 Johns. 409.

O'Neill, in reply, cited *Dob v. Halsey*, 16 Johns. 34 [8 Am. Dec. 293.]

By Court, NORR, J. In this case the court concur in opinion with the chancellor on the first exception to the report, for the reasons given in the decree. The defendant has sworn to a maximum which he declares unequivocally the cash receipts could not have exceeded, and in which he is sure he can not be mistaken. Opposed to this are the opinions of gentlemen founded on data which do not authorize any certain conclusion. And however respectable the witnesses are, their opinions, which

are merely conjectural as it regards this case, can not outweigh the positive answer of the defendant. This court, therefore, are of opinion that that exception was properly sustained by the chancellor.

With regard to the second exception, the court concur in the opinion expressed by the commissioner in his report. And the authorities relied on clearly support him in the views which he has taken. The bill states that the complainants and defendant entered into partnership in trade and merchandise; that the defendant was to superintend the business of the store, and to receive one third of "the profits realized by the said firm." The defendant in his answer admits that he did enter into partnership with the complainants, as in the bill stated, and that he was to receive one third of the profits as therein stated. If, therefore, the defendant's acknowledgment of the fact is to be used as evidence of the copartnership, everything required to be proved is admitted. The terms of the contract admit of no other construction. He was to receive one third of the profits realized by the firm. In the case of *Grace v. Smith*, 2 W. Bl. 998, Chief Justice DeGrey says: "Every man who has a share of the profits of a trade ought also to bear his share of the loss." Judge Blackstone, in the same case, says: "I think the true intention is to consider whether profit is certain and defined, or casual, indefinite, and depending on the accidents of trade. In the former case, when money is advanced it is a loan; in the latter, a partnership." And I take it that that is the distinction which runs through all the cases; if a person derives a certain emolument from the trade, then he is not a partner; if his emoluments depend upon the profit and loss, then he is considered as such. There is a particular class of cases in which although a person may receive a share of the profits only, he will not be considered a partner, as where he is to receive a share of the profits of a mere isolated transaction; such as the case of *Muzzy v. Whitney*, 10 Johns. 226, and the cases there cited. But then the question was merely whether the defendant was a partner in such a sense of the word that an action at law could not be maintained against him.

And in the present case, it is not further necessary to go into the inquiry than to ascertain the true construction of the contract, with regard to the compensation which he was entitled to receive. And there can be but little doubt that he must be considered so far a partner as to share in the profit and loss. The profits "realized" by the firm could have been only such

as remained after the losses were deducted. It is admitted that he was liable to the losses usually incident to mercantile speculation, such as bad debts, and the like. But suppose a hogshead of brandy, or pipe of wine, had sprung a leak, and had been lost; or that the rain had beat in, and destroyed a quantity of sugar or salt; or that by some misfortune a quantity of crockery or glass had been broken or destroyed, all these must have been carried to the account of profit and loss, and must so far have reduced the dividend of the defendant; and if the loss should turn out to be equal to the profit, it would not be difficult to ascertain how much was realized by the firm. Whether the loss should happen by fire or by either of the casualties above mentioned, could not, in my opinion, alter the result. The parties had all embarked their fortunes in one common concern, and were all equally dependent on the success of their undertaking for the profits which they were to receive. It was inconsistent with the nature of the contract, that one should gain, and the other should lose. I am of opinion therefore that the decree of the chancellor on this point should be reversed, and that the exceptions be overruled.

The exceptions on the part of the complainants, in relation to interest, I think, ought to be sustained. The rule in England, if the opinion of Lord Ellenborough in the case of *De Haviland v. Bowerbank*, 1 Campb. 50, is to be considered as authority on that point, is that a person shall not be required to pay interest, except where there is an express stipulation to that effect, or where it may be inferred from the course of dealing between them that such was the understanding; or where it can be proved that the party has used the money, and derived a profit from it.

But our rule has been, where one man has retained the money of another, to presume that he kept it for the purpose of profit, and that therefore he ought to pay interest upon it: *Goddard v. Bullow*, 1 Nott & McC. 46 [9 Am. Dec. 663]. The balance due by the defendant is so much of the funds of the firm retained by him to which he was not entitled, and for the use of which he ought therefore to pay interest. On this point, also, the decree of the chancellor must be reversed. With regard to the costs, the court is not disposed to interfere.

It is, therefore, ordered and decreed that the case be referred to the commissioner to amend his report in conformity with the principles herein laid down.

Decree reversed.

WHAT CONSTITUTES A PARTNERSHIP.—See *Dob v. Halsey*, 8 Am. Dec. and note 297; *Osborne v. Brennan*, 10 Id. 614; *Miller v. Hughes*, Id. 719; *Spears v. Toland*, Id. 722.

WHEN INTEREST ALLOWED.—*Hunt v. Jucks*, 1 Id. 555, and note; *Kennon v. Dickins*, 2 Id. 642.

LINING v. GEDDES.

[1 McCORD'S CH., 304.]

JURISDICTION OF COURTS OF EQUITY.—Courts of equity have jurisdiction only in cases where the ordinary tribunals of justice can not afford relief. **THE MERE NOVELTY OF A QUESTION** does not justify an inference of want of jurisdiction.

WHEN INJUNCTION WILL NOT BE GRANTED.—Courts of equity will not interfere by injunction to prevent a mere trespass, unless there is danger of irreparable mischief, or the value of the inheritance is jeopardized; nor to prevent a private nuisance, unless it would cause injury, such as no damages could compensate; nor to prevent the erection of obstructions that can be easily and speedily removed.

SPECIFIC DELIVERY OF CHATTEL.—As a general rule the court will not decree the specific delivery of a chattel, because in such case the party has a simple and adequate remedy at law, and to obtain such a decree it is necessary to show that the articles have acquired, from some cause, a value for the loss of which no damages would be a compensation.

BILL in equity praying for an injunction to restrain the defendants from obstructing a private right of way to which the complainant claimed to be entitled. The chancellor enjoined the defendants from stopping up the road in question until the further order of the court, and the defendants appealed.

By Court, **Norr, J.** The chancellor has granted an injunction, and this is a motion to reverse that decision. The chancellor who granted this injunction seems to have been impressed with the novelty and importance of the question; and although he granted the injunction, seems to have done so with that cautious doubt which such a case was calculated to excite. I agree with him that a want of jurisdiction is not to be inferred alone from the novelty of the question; for it is not every new case that involves a new principle. The fact, however, that no such question has ever before been agitated in our courts is a strong reason why we should pause before we act; and that we ought not to proceed before we can see some clear and well-grounded principle to authorize the procedure. The jurisdiction of the court of equity is an extraordinary jurisdiction. And it is only where the ordinary tribunals of justice can not afford relief, that a court of equity is authorized to interfere.

Hence the well established maxim that a court of equity can not entertain jurisdiction of a cause where the party has a plain and adequate remedy at law. That is not only a well-settled principle in England, but it is recognized in this country, and re-enforced by an express provision of the act of assembly of this state, passed in the year 1791. And even though it be admitted that that clause is nothing more than a recognition of the common law maxim, it must have been intended at least to give emphasis to a provision somewhat calculated to set bounds to the vague jurisdiction of that court. The people of this state have a veneration for the principles of the common law; they have an attachment for the trial by jury, which they will not readily transfer to any other tribunal. And whoever will trace the progress of equity jurisdiction will find that it has been gradually advancing, step by step, to the consummation of its power, until there is scarcely a case in the annals of litigation over which its empire has not been extended. It is true that this jurisdiction is somewhat of that undefinable nature that renders it difficult to make out its bounds with such precision as to render them at first glance distinctly visible.

But I am nevertheless of opinion that by attention to particular cases as they occur, certain principles may be established beyond which it will not be permitted to go, and within which the exercise of its power can not be dangerous. The extent of the chancery jurisdiction on this subject is pretty fully discussed, and the history and progress of it traced up with a good deal of learning and research by Chancellor Desaussure, in a note to the case of *Shubrick v. Guerard*, 2 Desau. 619. The subject has also undergone the review of Chancellor Kent in several cases before him in New York: *Kane v. Vanderburgh*, 1 Johns. Ch. 11; *Stevens v. Beekman*, 1 Id. 318; *Douglass and others v. Wiggin and another*, 1 Id. 435; *Livingston v. Livingston*, 6 Id. 497; see, also, Eden on Injunctions, 157, under the head of injunctions to stay purprestures and nuisances. In these authorities all the cases will be found collected in which the principle is involved, and although there is some little contradiction in the cases, we shall find the general rule to be that a court of equity ought not to interfere to prevent a mere trespass. And though the old rule on that subject seems to be somewhat relaxed, and, according to Lord Eldon, injunctions are now granted more liberally than formerly, yet it appears to me that the principle is still preserved, and the greater liberality in granting injunctions seems to consist in the application of the rule to a greater number of cases than formerly, rather than in

the extension of the principle itself. There must be, as Judge Kent expresses it, something particular in the case so as to bring the injury under the head of quieting possession, or to make out a case of irreparable mischief, or where the value of the inheritance is put in jeopardy: *Livingston v. Livingston*, 6 Johns. Ch. 501; see, also, 1 Madd. Ch. 138, tit. Injunctions to stay Waste. The true ground is, that the injury must be of such a nature that the party can not have an adequate remedy at law. Whenever, therefore, the trespass amounts to waste, nuisance, or other irreparable injury, the court of equity interposes by way of injunction and not otherwise. The same rule applies in the cases of specific performance. And although the cases of this description are not directly applicable to the case now under consideration, yet they may tend to illustrate the general principles of equity jurisdiction.

The general rule in those cases is, that the court will not direct the specific delivery of a chattel. And for reasons before stated, because the party has a plain and adequate remedy at law. Nor would the remedy be considered inadequate, merely because the specific article might be made more convenient or gratifying to the party than damages, for withholding or destroying it. To this rule, however, there are exceptions. In the progress of society, cases will necessarily spring up, peculiarly applicable to a more advanced state of civilization, while others will be left behind which had their origin in an age comparatively rude and barbarous. Among others might be mentioned articles which have acquired an ideal, or perhaps a real value from the peculiar situation of the owner, and for the loss of which no damages would be a compensation. Such as the Pusey horn, by which the complainant held his land: *Pusey v. Pusey*, 1 Vern. 273; or the silver altar piece, being a matter of antiquity and curiosity, in the case of the *Duke of Somerset v. Cookson*, 3 P. Wms. 390. So in the case of *Fells v. Read*, 3 Ves. jun. 70, Lord Rosslyn decreed the delivery of the silver tobacco box which had for a great many years belonged to a society; because, from the nature of the thing, the value was inestimable. A similar decision was made by Lord Eldon, in the case of *Lady Arundel v. Phipps*, 10 Ves. 148, which involved a question in relation to family pictures. These are cases which have their foundation in the refinement of society, and those affections of the heart which it would be a reproach to the country not to indulge. But still they depend on the plain, tangible principle, that there is no adequate remedy at law, and the principle must not be extended to cases founded in weak-

ness and folly. It would therefore be a perversion of the rule to apply it to the delivery of a favorite spaniel or a lady's lap-dog.

There is a class of cases to which it is contended the one now under consideration more immediately belongs, in which it is admitted a court of equity will interfere, I mean private nuisance. But the same rule applies even to those cases. The nuisance must be such as will cause an irreparable injury to an individual, such as no damage would compensate: Eden, 157; 3 Atk. 161, 751; 16 Ves. 342; Moore, 145; 1 Bro. C. C. 588; 10 Ves. 194. It is not every trifling diminution of the value of property, nor a mere temporary injury, that will authorize the interference of the court of equity: Eden, 154, *et infra*. The cases where the court has interfered, are the stopping of ancient lights, diverting water-courses, etc. But then the stoppage must be by some permanent wall or building, which would amount to a perpetual privation of enjoyment, and which, therefore, could not be repaired in damages. The bare planting of a tree, or hanging up of a sign, which could easily be removed upon establishing the right at law, would not be sufficient. The same might be said of diverting a water-course. It must be by some work of a permanent nature, and not merely by throwing a log across a stream, which might be easily removed. Now, what is the nuisance here complained of which is about to be erected? The building a fence across the road, or cutting a ditch, either of which could be done in less time than a bill for an injunction could be drawn, and might be removed in less time than a motion for the dissolution of the injunction could be argued. It is not a case which requires the aid of this court, and certainly not until the right has been determined at law. Neither are the circumstances such as to require the interposition of the court until such trial can be had. The decree therefore must be reversed, and the bill dismissed with costs.

Decree reversed.

Cited as *Guerard v. Geddes*, and commented upon and approved in *United States v. Parrott*, McAll. 316.

INJUNCTIONS AGAINST TRESPASS.—On this subject see the leading case of *Jerome v. Ross*, 11 Am. Dec. 484, and extended note thereto 498; *Livingston v. Livingston*, 10 Id. 353; *Willet v. Overton*, 1 Id. 72.

IRREPARABLE INJURY will authorize the issue of an injunction where there is no adequate remedy at law: *Poindexter v. Henderson*, 12 Id. 550.

INJUNCTIONS ISSUE to protect those rights only which are clear: *Snowden v. North*, 14 Id. 547.

McCANTS v. BEE.

[1 McCORD'S CH., 363.]

WHEN LEGATEE BECOMES A TRUSTEE.—A legatee who takes an estate subject to a trust takes it as a trustee.

A TRUSTEE CAN NOT PURCHASE FOR HIMSELF, nor deal with the *cestui que trust*, in reference to the trust estate.

PURCHASES BY A TRUSTEE FROM HIS CESTUI QUE TRUST will not be sustained by courts of equity unless, after the most rigorous scrutiny, it clearly appears that there is no fraud or concealment in the transaction, and no advantage taken by the trustee of information obtained by him in that capacity.

COURTS OF EQUITY WILL RELIEVE AGAINST PRESUMPTIVE FRAUD, and will set aside hard and unconscionable contracts, even in cases where there is no actual fraud; especially if such contracts are made by parties acting in a fiduciary capacity.

TO TAKE ADVANTAGE OF A MAN'S NECESSITIES is as bad as to take advantage of his weakness.

RATIFICATION OF IMPEACHABLE CONTRACT.—A confirmation of an impeachable contract to be valid must be made with full knowledge of all the circumstances, with a view to confirm, and after the pressure and influence of the original transaction have been removed.

AN EXECUTOR HAS NO POWER TO SELL property after he has delivered it over to the legatee.

A POWER UNDER A WILL TO SELL such property of a testator as may be useless to his estate does not authorize an executor to sell whatever property he pleases.

BILL in equity praying for payment of the legacy mentioned in the opinion, with interest. The chancellor dismissed the bill, and the complainants appealed. The facts are sufficiently stated in the opinion.

H. F. Desaussure, for appellants, contended that the estate in possession of the defendant was chargeable with the legacies. He was, therefore, a trustee and not at liberty to contract with the complainant. The price was grossly inadequate, the legacy, with the interest, amounting to nearly eight hundred dollars, and the negro woman being old and diseased. The complainant certainly, and the defendant probably, were ignorant of the fact that the legacy carried interest, and they, therefore, acted under a mistake. Besides, the defendant had no title in the negro beyond a life-estate.

Lance, for appellees, replies that the contract was moved by the complainant, and the defendant acted throughout with perfect fairness and liberality.

By Court, *Norr, J.* The testatrix in this case gave the com-

plainant, S. E. McCants, then S. E. Campbell, a legacy of one hundred and fifty pounds, without interest, until it was convenient to her executors to put it out at interest, or to purchase public stock therewith, and to pay it over to her when she should arrive at the age of eighteen years, with the accumulated interest. After giving certain other legacies, she gave all the residue of her estate, consisting of lands and negroes, to her executors, in trust, for certain specific purposes, until her grandson, J. F. Bee, the defendant, should arrive at the age of twenty-one years, and then she gave the whole to him during life, etc., and upon the happening of certain contingencies, over to the complainant, S. E. Campbell. The legacy to the complainant was never paid by the executor. Neither was it put out at interest, or vested in stock, or otherwise employed for her benefit; but the whole of the estate was delivered to the defendant, J. F. Bee, on his arrival at the age of twenty-one years. When the complainant arrived at twenty-one years, she applied for her legacy, which was not paid. For four years, she said, she was making incessant but unsuccessful applications for it; she was poor and necessitous, and much in want of money. These facts must be taken as true, because they are brought out by the defendant, who has examined her by interrogatories, and has thereby made her his own witness; yet neither her solicitations nor her necessity could prevail. She could procure during that period only twenty dollars, although the estate appeared to have been ample. Wearied out with knocking at defendant's door and exposing her wants, she at length proposed to accept this negro woman, whom she supposed she could hire out for a support, as she was in want of money, and had not even the means of subsistence. She was led to believe that her legacy did not carry interest, and therefore agreed to accept this slave in full satisfaction of her claim. She afterwards discovered that she had been imposed upon, and applied to the defendant to do her justice, by allowing her something more. A hundred dollars was promised, but has never been paid. She has since married, and her husband has endeavored to obtain that justice which she was unable to procure. But his efforts have been equally unsuccessful. After several fruitless attempts, he has been driven by necessity to seek that relief in the court of equity which he despaired of obtaining by any other means. The chancellor being of opinion that they were not entitled to relief, dismissed the bill. And this is a motion to reverse that decree.

By the terms of the will, as also by the nature of the trust created by it, the legacy due to the complainants ought to have been paid before the property was delivered up to the residuary legatee. The legatee, therefore, received the estate coupled with the trust, and, therefore, took upon himself, in relation to complainant, the character of a trustee. The rule, that a trustee can not purchase for himself, nor deal with the *cestui que trust* with regard to the trust estate, is very well settled by the decisions of the English courts: see 1 Madd. Ch. 111, 112, and the cases there cited, and particularly the case *Ex parte Bennett*, 10 Ves. 385; and the principle has been repeatedly recognized by our courts. There are indeed cases where purchases made by a trustee of his *cestui que trust* have been supported; but these are where, after a scrupulous examination of all the circumstances, the court is satisfied that there is no fraud, no concealment, no advantage taken by the trustee of the information acquired by him in the character of trustee: 1 Madd. Ch. 113; *Coles v. Trecothick*, 9 Ves. 247; *Morse v. Royal*, 12 Id. 372, 373. The case now under consideration is one of a sale by the trustee to the *cestui que trust*, and not of a purchase; but the same principle must apply: 1 Madd. Ch. 115; *Gibson v. Jeyes*, 6 Ves. 266.

It is now contended that the complainant had the means of knowing the value of the property as well as the defendant; but the evidence on that point is not very clear; and if the fact be admitted, it was when she was very young, and can not be supposed to have been a very competent judge. Besides, many years had elapsed, during which the advantage was altogether on the side of the defendant. And I am not by any means, therefore, satisfied that the court would not be authorized on that ground alone to set aside the contract. But independent of the abstract principle, that the trustee shall not be permitted to contract with the *cestui que trust* in relation to the trust estate, it is most apparent that the defendant availed himself of the distressed situation of the complainant to force upon her a bargain utterly subversive of her just rights. There are many cases of hard and unconscionable contracts, which do not amount to actual fraud, particularly of persons acting in a fiduciary character, which furnish ground for relief in a court of equity. It is unnecessary to go into a full examination of the cases on that subject, as they have been lately fully examined and discussed in the case of *Buller v. Haskell*, 4 Desau. 652. And although I believe the decision of that particular case did not give gen

eral satisfaction, yet I am of opinion that upon an impartial examination it will not be found so reprehensible as has been generally supposed. However that may be, it furnishes numerous cases which go to establish the general principle which I am endeavoring to point out. Lord Hardwicke, in the case of *Lora Chesterfield v. Jansen*, 1 Atk. 339, 352, says: This court will relieve against presumptive fraud; so that equity goes further than the rule of law, for there fraud must be proved, and not presumed only. "To take advantage of another man's necessities is as bad as to take advantage of his weakness." Indeed, the defendant does not deny, and the decree itself seems to admit, the general principle for which the plaintiffs contend. And if any such cases exist I can hardly conceive of one in which the parties would have stronger claims to relief than the case now under consideration. The complainant was entitled promptly to her legacy, on her arrival at the age of eighteen. The defendant was in possession of the funds out of which it was to be paid, and enjoying the profits of it; yet for four years, notwithstanding he knew of her destitute situation, her entreaties were disregarded until she was obliged to accept of what he was willing to give, as the only resource for the means of subsistence. The principal grounds of defense are: 1. That the proposition came from the complainant herself; 2. That the defendant did not know that she was entitled to interest; 3. That she afterwards confirmed the bargain.

It is true that the proposition came from the complainant, but under circumstances which do not at all weaken her claim to relief. It was not until she despaired of obtaining justice from the defendant, that she yielded to the necessity of making a proposition which at last promised to contribute something to her support; and that is now called a voluntary offer on her part, and urged as a concession on the part of the defendant to gratify her particular desire. With regard to the interest, if the defendant did not know at that time that she was entitled, he has learned it since, and knowing that it was not paid, he knew that it was still due.

The last ground of defense is, that the complainant has since confirmed the contract. It is true, a person may confirm a contract which was before liable to impeachment, but then it must be after the party has come to a knowledge of all the circumstances, and does it with a view to a confirmation, knowing that it might be impeached and after the pressure and influence of the original transaction has ceased: 1 Madd. Ch. 16; 2 Sch. & Lef. 474.

But let us examine this confirmation on which the defendant relies. When reproached by the complainant with not having done her justice, as if reproved by his own conscience, he promises to pay her one hundred dollars more. But it was never paid. And now a mere naked promise, such as he thought proper to make, but which it does not appear she ever agreed to accept, and which has never been performed, is set up as a bar to the just claims of the complainants. So far, therefore, from being a confirmation of the former contract, it was an admission on the part of the defendant that he had not done her justice. If the demand of the complainant had been of an uncertain or doubtful character, the court might not, perhaps, have suffered the transaction to be unraveled. But it was a debt certain which the defendant was bound in law and honor to pay, and for the payment in which the funds had been placed in his hands. Every ground of defense on which the defendant relies, furnishes evidence of the merits of the complainant's claim, and of her right to relief. Everything she did was under the pressure of a necessity, which left her neither free to act nor to think. She was solitary, poor and friendless; and the defendant who had voluntarily assumed the character of trustee, and from whom therefore she had a right to expect the most liberal justice, took advantage of her situation to impose upon her a bargain which he admits to be unjust. He admits it, when he offers to pay the additional sum of one hundred dollars. He admits it, when he refuses to accept the offer of the husband to take the negro woman at her value, if he will pay up the balance. He admits it, when he refuses to accept the complainant's offer to keep the negro woman at the price of five hundred dollars, in part payment, for it must be certainly a very high price. And he admits it when he says he did not know that she was entitled to interest; because he thereby admits that the interest was not paid, and is, therefore, still due.

But as this court is always reluctant to interfere with contracts under whatever circumstances they may have been made, I shall not rest my opinion alone on the grounds which have been considered. The complainant has still stronger claims on the aid of this court. It appears from the will of the testatrix, and Mr. Bee himself admits, that he had only a life estate in the property which he sold the complainant. It also further appears that upon certain contingencies which need not necessarily be very remote, the same property will go over to the complainant herself. So that the defendant has not only paid

the legacy in property which was not at his disposal, but to which the complainant may become entitled to under his will. To this it is answered that the executor has power under the will to dispose of the property, and that he is willing and has offered to confirm the contract. Without entering into the question how far an executor has the authority, by virtue of his office as executor, to dispose of the effects of the estate without permission of the ordinary, it is sufficient in this case to observe that there are two executors, and one only has agreed to confirm. Besides, that one has executed his trust by delivering over the property to the residuary legatee, and therefore has no further control over it. With regard to the special power under the will to sell, it is to sell any part of the stock of the testatrix, or any other property which may be useless to her estate. Now that clause can not be construed into a general power to sell any property which the executor might think proper, for it embraces only such as is useless. It can not mean her negroes; but they are directed to lay out the surplus funds of the estate in the purchase of negroes. If indeed this negro be of such a description as to be useless to the estate, it then comes within that provision of the will. But then it would make the defendant guilty of an actual fraud, which I am not willing to suppose. I will not presume that he intended to impose upon her property which he knew to be worthless. I think, therefore, the executor derives no such power from the will, and that the contract must be set aside. The decree of the chancellor, therefore, must be reversed. But as the complainants have had the use of the slave, it is right that they should account for her services during that period.

It is therefore ordered and decreed that the decree of the chancellor be reversed and the contract set aside. That the complainants do deliver up to the defendant, J. F. Bee, the negro woman in question, and that they do account to him for her services from the time she came into the possession of the complainant, Mrs. McCants. And that the defendant do pay to the complainants the legacy, with interest thereon from the time it became due, deducting therefrom the amount which shall be found due for the services of the negro woman. And that it be referred to the master to adjust the accounts between the parties, and report thereon to the next court of equity, and that the defendant do pay the costs.

Decree reversed.

TRUSTEE DEALING WITH CESTUI QUE TRUST IN RELATION TO TRUST ESTATE.—Courts of equity regard with great distrust all transactions between trustees and beneficiaries, in relation to the trust property, and such transactions will not be approved or sustained, unless upon the clearest proof of their perfect fairness in all respects. The general rule is that a trustee is disabled from purchasing the trust property, whether it be real or personal; whether the purchase be made in the trustee's own name, or in the name of another for him, by private contract, or at public auction; from himself as the single trustee, or with the sanction of his co-trustees: *Lewin on Trusts*, 460. For "no party can be permitted to purchase an interest where he has a duty to perform that is inconsistent with the character of purchaser:" *Torrey v. Bank of Orleans*, 9 Paige, 649; *Hill v. Frazier*, 22 Pa. St. 320; *Michoud v. Girod*, 4 How. (N. S.) 503; *Ricketts v. Montgomery*, 15 Md. 46; *Hoitt v. Webb*, 36 N. H. 158; *Robbins v. Butler*, 24 Ill. 387; *Overton v. Collins*, 1 Head, 251; *Ames v. Port Huron L. D. & B. Co.*, 11 Mich. 139; *Moore v. Hilton*, 12 Leigh, 1; *Gridler v. Payne*, 9 Dana, 188; *Van Epps v. Van Epps*, 9 Paige, 237; *Winn v. Dillon*, 27 Miss. 494; *Casey v. Casey*, 14 Ill. 112; *Jamison v. Glascock*, 29 Mo. 191; *Van Dyke v. Johns*, 12 Am. Dec. 76, and note; *Davis v. Simpson*, 9 Id. 500; *Lingstack v. Harding*, 7 Id. 669; *Dorsey v. Dorsey*, 6 Id. 506. And some authorities go so far as to hold that purchases of trust property, especially such as are made by the trustee from himself, are void. In *Morse v. Royal*, 12 Ves. 355, Lord Chancellor Erskine said: "To that class of cases I shall add the case of a trustee selling to himself. Without any consideration of fraud, or looking beyond the relation of the parties, that contract is void:" *Michoud v. Girod*, 4 How. (N. S.) 503; *Martin v. Wyncoop*, 12 Ind. 266. And other decisions hold that trustees in such cases are absolutely prohibited from becoming purchasers: *Ex Parte Bennett*, 10 Ves. 381; *Monroe v. Allair*, 2 Cal. Cas. in Error, 183; *North Baltimore Bdg. Assn. v. Caldwell*, 25 Md. 420; *Korns v. Shaffer*, 27 Id. 83; *Wright v. Campbell*, 27 Ark. 637. It is possible that the judges, in the authorities cited above, have, owing to circumstances connected with the particular cases before them, stated the rule somewhat too strongly. The great preponderance of authority is certainly in favor of regarding purchases made by the trustee of the trust property voidable, and not absolutely void: *Ives v. Ashley*, 97 Mass. 198; *Davone v. Fanning*, 2 Johns. Ch. 252; *Mercer v. Newson*, 23 Ga. 151; *Torrey v. Bank of Orleans*, 9 Paige, 649; *Hawley v. Cramer*, 4 Cow. 718; *Thorp v. McCullum*, 1 Gilm. 614; *Boyd v. Blankman*, 29 Cal. 19; *Dunlap v. Mitchell*, 10 Ohio, 117; *Painter v. Henderson*, 7 Pa. St. 50; and the American editors of leading cases in equity say: "It is well settled that a purchase by a trustee at his own sale is voidable, not void, and may be ratified by the *cestui que trust*:" 1 *Leading Cas. in Eq.*, pt. 2, p. 830.

The rule deducible from the authorities carefully considered seems to be this, that equity will not permit the trustee to deal with the trust property, except for the benefit of the *cestui que trust*, or beneficiary, and the latter is entitled, as a matter of right, to come into a court of equity and have the transaction set aside without being bound to show that the trustee made a bargain advantageous to himself: *Boynton v. Brastow*, 53 Me. 362; *Staats v. Bergen*, 17 N. J. Eq. 554; *Davone v. Fanning*, 2 Johns. Ch. 252; *Ex parte Bennett*, 10 Ves. 393. And "a trustee may buy from the *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, providing that the *cestui que trust* intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee:" *Coles v. Trecothick*, 9 Ves. 234; *Fox v.*

Mackreth, 2 Bro. C. C. 400; *Brackenridge v. Holland*, 2 Blackf. 377; *Farnam v. Brooks*, 9 Pick. 212; *Perry on Trusts*, sec. 195. But the burden of proof is upon the trustee to show that the transaction is free from all taint or suspicion of unfairness, and in all respects advantageous to the beneficiary: *Perry on Trusts*, sec. 194; *Sollee v. Croft*, 7 Rich. Eq. 34; *Litchfield v. Cudworth*, 15 Pick. 23; *Coffee v. Ruffin*, 4 Coldw. 487; *Pairo v. Vickery*, 37 Md. 467; *Lowther v. Lowther*, 13 Ves. 95; *Crosskill v. Bowers*, 32 Beav. 86, *Pooley v. Quilter*, 2 De G. & J. 327; *Spring v. Pride*, 10 Jur. (N. S.) 646; *Hawley v. Cramer*, 4 Cow. 717; *Freeman v. Harwood*, 49 Me. 195; *Story Eq.*, sec. 321, 322; *Hill on Trustees*, 247.

In *Smith v. Townsend*, 27 Md. 368, the court say: "In order to support a purchase of a trustee from a *cestui que trust*, it must appear that the trustee has thoroughly divested himself of that character in the transaction, and entered into a new and distinct contract with the *cestui que trust*, that person having the fullest information on every subject:" *Lewin on Trusts*, 463.

"It is thus seen that the rule against purchasing by trustees of the *cestui que trust*, amounts almost to prohibition:" *Perry on Trusts*, sec. 197. And Lord Eldon said, in *Coles v. Trecothick*: "I admit it is a difficult case to make out wherever it is contended the exception prevails." In that case the beneficiary took the whole management of the sale, approved the auctioneer, made surveys, settled the plan of sale, fixed the price, had a perfect knowledge of the property, and then, by an agent, but with his own personal consent, bought in to one of the trustees acting as agent for another, and Lord Eldon decreed the agreement to be specifically performed. In *Morse v. Royal*, 12 Ves. 355, the *cestui que trust* had urged the purchase upon the trustee, who at first expressed an unwillingness, but afterwards agreed to the terms, and the sale was supported. In *Clarke v. Swaile*, 2 Eden, 134, the trustee had endeavored in vain to sell and then bought himself of the *cestui que trust*, at a fair and adequate price; and the lord chancellor said that although he did not like the circumstance of a trustee dealing with the *cestui que trust*, upon the whole he did not see any principle upon which he could set the transaction aside: See, also, *Buell v. Buckingham*, 16 Iowa, 284.

GIFTS FROM CESTUI QUE TRUST TO TRUSTEE.—Courts of equity are, if possible, still more watchful to prevent a trustee from taking advantage of his position to obtain from his *cestui que trust* any gift or reward for past service performed: *Hunter v. Atkins*, 2 Myl. & K. 135; *Hylton v. Hylton*, 2 Ves. sen. 549; *Hatch v. Hatch*, 9 Ves. 296.

WHO MAY AVOID VOIDABLE ACTS OF TRUSTEES.—The *cestui que trust* may ratify the transactions of the trustee in relation to the trust property: *Dunlap v. Mitchell*, 10 Ohio, 117; *Beeson v. Beeson*, 9 Pa. St. 279; *Morse v. Royal*, 12 Ves. 355; and he alone can avoid them: *Larco v. Casaneuava*, 30 Cal. 560; *Price v. Oleghorn*, 21 Ind. 80; *Thorp v. McCullum*, 1 Gilm. 614; *Wilson v. Troup*, 14 Am. Dec. 458.

SMITH v. TUNNO.

[1 McCORD'S CH., 443.]

THE RELATIONSHIP SUBSISTING BETWEEN THE JOINT OBLIGORS OF A BOND is a matter wholly extraneous to the written contract, and parol evidence is therefore admissible to prove it.

THE PARTY WHO RECEIVES THE BENEFIT from the contract, and makes the payments and all arrangements in reference to it, is the principal.

SUBROGATION OF SURETY TO RIGHTS OF OBLIGEE.—A surety has a right to be subrogated to all the securities which the obligee has.

RELEASE OF SURETY.—If the obligee releases any of his securities, or enters into a new contract with the principal, by which the terms of the original contract are varied, without the knowledge or consent of the surety, he will be discharged from his liability.

AN ASSIGNEE IS BOUND by the acts of his assignor.

MERE FORBEARANCE TO SUE or to demand payment will not discharge the surety in a bond.

A MODIFICATION OF AN EXISTING CONTRACT may be made by the parties thereto on any new consideration, and such new contract extinguishes the old.

BILL praying to be released as surety in certain bonds. Campbell purchased certain lands at a master's sale, and the bonds set forth in the bill were signed by him and W. L. Smith, the complainant's testator, and given to Gibbes, the master, for the purchase. On the face of the bonds, both Campbell and Smith appeared to be principals; but it appeared that Campbell was the purchaser, the titles of the property were made to him only, and he had the exclusive benefit of it. Smith never pretended to have any interest in the property, and the bill stated that he signed merely as a surety. The bill further alleged that Campbell applied to Smith to become his surety in the bonds, which he declined to do until assured by the master that his signing the bonds was mere matter of form, as the whole of the property purchased was by the terms of the sale to be mortgaged to the master to secure their payment, and that titles could not be given, pursuant to the conditions of the sale, until the mortgage was given. The bill was filed against Tunno and Davidson, survivor of Simpson and Davidson, who held the bonds by assignment. The statements of the bill were supported, in a material part, by the fact that the property purchased was to be mortgaged, the master having stated in the conditions of sale made in 1792, that "good personal security, or other adequate securities, with mortgages of the property purchased, will be required." In 1794, James Smith, who then held the bonds as assignee, made a new contract with Campbell, without the knowledge of W. L. Smith, consolidating the principal and interest, and extending the time of payment. The chancellor released Smith from the bonds, and perpetually enjoined the defendants from proceeding to recover on them, and the defendants appealed.

Dawson and Pettigrew, for the appellants. The defendant was an innocent purchaser without notice, that a mortgage re-

quired by the terms of the sale was not given, and that Smith was only a surety. By the terms of the bond he is a principal, and mere presumptions arising from the fact that the lands were bid off by Campbell, and the titles made to him, ought not to be admitted to control them. The omission to take the mortgage was the act of Gibbes, and the neglect of Smith, who could have insisted on it. There is no evidence in this case that the contract was varied without the privity of the surety; at most, the agreement to vary it was only verbal, and not binding. A contract by specialty can not be extinguished by a parol contract; nor can one contract extinguish another of the same kind. Smith was in fault because he did not call on the creditor to proceed to the collection of his debt. The parol agreement could not have stood in the way of his doing this. Even admitting the agreement proved it could not avail as a defense, for it was usurious, and therefore void. The interest on the bonds was payable annually, and the law of the court allows interest on interest without the aid of the new contract. It was, therefore, without consideration and void.

Toomer, for appellee. Both the report and the testimony of the master show that Smith was only a surety. So does the fact that James Smith treated with Campbell alone for further time to pay the bonds. The test to apply in determining whether one is principal or surety is, did he derive benefit from the venture? If he did not, he is a surety only. When the payments are paid by one of several obligors, and all arrangements are made with him, it is an evidence that he is the principal. The assignee of a chose in action not negotiable, takes it subject to all the equities to which it would have been subject in the hands of the assignor. A surety has a right to be subrogated to the securities of the creditor. Changing the contract discharges the surety. The terms of the contract were, in this case, varied by a new contract in writing. But admitting that the new agreement was but verbal, it would have been a bar to an action brought on the bond before the end of the time limited. A new contract discharges the surety.

By Court, JOHNSON, J. The grounds of the motion may be resolved into the following propositions:

1. Whether parol evidence is admissible to prove that W. L. Smith was or was not a surety and not the principal debtor;
2. Whether the evidence proved the fact;
3. Whether the neglect on the part of Gibbes to take the

mortgage, according to the terms of sale, did not discharge the surety;

4. Whether the contract entered into between James Smith, the holder of the bond, in 1794, and Campbell, for further time of payment, did not discharge the surety.

It is a matter of common notoriety that contracts of this nature do not usually distinguish between the principal and the surety, and that it may and must be proved by parol is a conclusion which necessarily arises out of the numerous cases growing out of them, especially those where a recovery over is sought by the surety against the principal, and by the numerous rules of law which regulate their respective rights. And I take the principle to be that the relationship which subsists between the joint obligors is a matter wholly extrinsic of the written contract, and may therefore be proved by parol without any violation of the rule which prohibits the introduction of parol evidence to contradict or vary a written agreement.

The mode of distinguishing between a principal and a surety is by inquiring whether he who claims to stand in relation of security did or did not derive a benefit from the contract, and the proof of it may be deduced from the circumstance, and that all the payments and all the arrangements relative to it were made by one of several co-obligors: 2 Cai. Cas. 29; 2 Desau. 546; 7 Johns. 337. And testing this case by this rule, it is proved to a demonstration that W. L. Smith stood only in relation of a surety. The report of the sales made by Gibbes, the obligee, places him in that situation. He derives no interest from the contract. The holders of the bond treated with Campbell exclusively on the subject, which puts the matter beyond any rational doubt.

The right of a surety to be subrogated to all the securities which the obligee has, and the rule that the surety will be discharged if he releases them, are abundantly supported by the authorities quoted at the bar, and are not denied by the opposite counsel. But whether the principle can be extended so far as to cover the neglect of Gibbes to take a mortgage, which was contemplated by the terms of the sale, especially under the circumstances of this case, may, I think, well be doubted. The only circumstance relied on to show that a mortgage was to enter into the contract, is that it was promulgated as a condition of the sale, and it is obvious that Gibbes did not contemplate it otherwise than a security to himself, and not as an indemnity to the personal security that the purchaser was to give. He

might, therefore, without any violation of good faith, dispense with it if he was satisfied with the other security, unless the surety thought proper to insist on it. In short, the terms of the sale were merely proposals which the contracting parties were at liberty to vary at their pleasure at any time before the contract was consummated; and in the absence of any proof, and after an acquiescence of about eighteen years on the part of Smith, the surety, I think it a reasonable presumption that it was so understood between all the parties. This is, however, a question of some importance, and as it is not necessary to the decision of the case, the court have thought proper to reserve it.

It is a well settled rule that if the creditor or obligee of a bond enters into any new *bona fide* contract with the principal debtor, whereby the terms of the original contract are varied or altered, without the privity or consent of the surety, the surety will be discharged from his liability. The bill states that in 1794, James Smith, who then held the bonds as assignee of Gibbes, the obligee, in consideration that Campbell, the principal debtor, would pay promptly twenty pounds on each of the several bonds, and consolidate the interest then due, and thereby make an increased principal which would carry interest; agreed that he would give time for payment for several years beyond the time fixed by the bonds, and that this arrangement was made without the consent of complainants. The answer admits that such a contract was entered into, and one of the defendant's own exhibits shows that it was reduced to writing. The counsel for the defendant do not controvert the rule, but admitting it to its fullest extent, they contend: 1. That the defendant is an innocent assignee without notice, and can not be affected by any act done by an intermediate holder; 2. That to discharge the surety, the act done by the creditor must be such as would be obligatory on himself; and that, admitting the existence of the contract, it was without consideration, and amounted to no more than a forbearance to sue, which would not discharge the surety.

At common law the assignee of a bond could not sue in his own name. He was, therefore, compelled to sue in the name of the original obligee, and as a necessary consequence the defendant could have availed himself of all the equity which he had against the obligee. And the act of 1795, which makes these instruments assignable, expressly reserves that right to the obligor. The transfer of the bond to James Smith by Gibbes constituted him the unlimited agent of Gibbes in relation to

them. He would, therefore, have been bound by any act which he might have done; so that the first of these arguments can not prevail.

The argument founded on a want of consideration to support the agreement assumes, on the authority of the case of *Gibbes v. Chisolm*, 2 Nott & McC. 38 [10 Am. Dec. 560], that without that agreement the interest which had accrued would be consolidated into principal, and carry interest; and that the payment of twenty pounds could only be regarded as a payment *pro tanto*. In the case of *King v. Baldwin*, 2 Johns. Ch. 554, all the cases on this subject are collated by the masterly hand of Chancellor Kent, and from them it is clearly deducible that if a creditor vary the terms of the agreement with the principal, without the consent of the surety, the latter will be discharged. They proceed on the principle that the surety is entitled, on the payment of the debts himself, to be substituted to all the rights of the creditor by the terms of the original contract, which becomes impossible when they have been changed. And in the application of this rule, numerous cases prove that mere forbearance to call on the principal debtor for payment will not discharge the surety, for the obvious reason that the contract still remains the same. It follows then, as a necessary consequence, that to discharge the surety the agreement to vary the terms of the original contract must be such as to be binding on the creditor. Such an agreement must therefore possess all the ingredients of a substantive, independent, original contract. But for the purposes of this case, it will not be necessary to enter upon the nature and extent of the consideration that would be required to support such an agreement. The prompt payment of twenty pounds on each of the bonds, some of which were not then due, the agreement to consolidate the interest with the principal, and the reduction of the agreement to writing, constituted in any view of it a binding contract on James Smith, upon which both himself and defendant acted, and which both kept with good faith.

It has been further insisted that a contract by specialty can not be extinguished or abrogated by parol, and hence it is concluded that whatever might have been the terms of the new contract, Campbell's liability on the bond was unimpaired, and that the transaction only amounted to a forbearance to sue. This application of the rule appears to me to be too refined for practical purposes. When there are several contracts having the same object in view, that which furnishes the highest evi-

dence of it is to be preferred for the most obvious reasons; and as no contract is obligatory which has not some consideration for its basis, such new contract without it would be void. But that the parties may, upon any new consideration, make any modification of an existing contract, and thereby extinguish it, is a legal conclusion which admits of no doubt. For these reasons the decree of the circuit court is affirmed, and the appeal dismissed.

Decree affirmed.

WHAT WILL DISCHARGE SURETY.—See *Cope v. Smith*, 11 Am. Dec. 582, and note, 589; *Hunt v. Bridgham*, 13 Id. 458, and note; *King v. Baldwin*, 8 Id. 413; *Commissioners v. Ross*, 5 Id. 383; Note to *People v. Jansen*, Id. 279; *Buller v. Hamilton*, 2 Id. 692, and note; *Buchanan v. Bordley*, 1 Id. 387, and note.

SUBROGATION OF SURETY.—See *Hayes v. Ward*, 8 Am. Dec. 554, and note; *Creager v. Brengle*, 9 Id. 516.

MILES v. ERVIN.

[1 McCORD'S, OH., 524.]

CONTRACTS BETWEEN ATTORNEY AND CLIENT.—The law will not permit an attorney to take advantage of his relations with his client to make a contract in reference to property in litigation to the latter's disadvantage. AN ATTORNEY AND HIS CLIENT are not under any legal disabilities to contract with each other; but the attorney must show that he has not used his influence over his client to his prejudice, and that he has paid a full and fair price.

BILL in equity. It appeared from the bill and answer, and from the testimony of the witnesses, that the complainant, Miles, employed the defendant, Ervin, as his attorney, to bring suit against Harper for a tract of land claimed by Miles, upon which Harper had trespassed. The defendant advised the complainant that his title was good against Harper, but doubtful as to an outstanding title supposed to exist in the Alston family. Miles obtained a verdict against Harper, from which the latter appealed to the constitutional court. While the appeal was pending, Carloss applied to Ervin to unite with him in purchasing the land in question from Miles, from whom, he alleged, it could be bought low if he, Ervin, would throw cold water on Miles's title. Ervin agreed to join in the purchase, and some little time after, being consulted by Miles, he again advised him that his title was good as against Harper, but doubtful as against the Alstons. Miles then urged him to attend the con-

stitutional court and have the verdict affirmed, and promised to give him a bale of cotton for his services. The defendant went to Columbia for that purpose. Harper's appeal was abandoned, being struck from the docket without argument. While Ervin was at Columbia, Carloss offered Miles three hundred dollars for the land, which, after some negotiation, was accepted, and conveyances were subsequently made. Carloss sold the land to Brown for two thousand five hundred dollars, and shortly after gave to Ervin Brown's bond for nine hundred dollars, as his share of the profits of the transaction. Carloss warranted the title to Brown, and Ervin contracted, in writing, with Carloss to be responsible for his share of any loss or damage he might sustain by reason of his warranty. Miles refused to give Ervin the bale of cotton which he had promised him; and Ervin paid Carloss fifty dollars in part payment of his share of the purchase-money paid to Miles. The chancellor decreed that the defendant deliver up the bond for nine hundred dollars to the commissioner of the court, to be held by him for the use of Miles until he secured, to the commissioner's satisfaction, the defendant against the effect of the warranty given by Carloss to Brown, on which Ervin had made himself liable to Carloss. From this decree the defendant appealed.

Miller, for the appellant, contended that the rule that an attorney can not buy from his client, does not apply so rigidly to a mere attorney in court, who has no power to sell; and that most of the cases in which the general rule was laid down were mere agencies to sell. He cited and commented upon *Morse v. Royal*, 12 Ves. 351; *Drapers' Comp. v. Davis*, 2 Atk. 295; *Jeyes v. Gibson*, 6 Ves. 266; *McGuire v. McGowen*, 4 Desau. 486.

Evans, contra.

By Court, JOHNSON, J. The court concur in the opinion expressed by the presiding judge as to the liability of the defendant, and will take occasion hereafter to express the reasons on which that concurrence is founded.

The order directing that Brown's bond should be delivered to the commissioner, or that the money received by defendant should be paid to him does not, and could not, impose on the complainant any imperative obligation to comply with the terms on which it is to be transferred to him. Inconvenience and probable loss might arise to the defendant if the complainant should refuse or neglect to do so, and no possible injury can re-

sult to complainant from a modification of the decree so as to require that the indemnity contemplated should precede the delivery of the bond or the payment of the money. It is, therefore, ordered and decreed that on the complainant's securing the defendant, to the satisfaction of the commissioner, against his liability on the warranty title executed by Carloss to Brown, and on his liability on his contract with Carloss, that the defendant shall forthwith deliver to the commissioner Brown's bond for nine hundred dollars, and pay over to him what money he may have recovered thereon, if any; or that he shall pay the amount of the said bond to the commissioner to be by him delivered and paid over to the complainant.

Jan. 1827. Mr. Justice Johnson afterwards delivered more at large the following opinion of the court: On a former occasion this court expressed its concurrence in the judgment pronounced in this case by the circuit court, but not entering fully into all the reasonings on which that judgment is founded, it has devolved on me to express those on which the concurrence of this court proceeds. The authorities which have been put in requisition have left a gleanings so scanty and barren that the labor of collecting them would not be compensated by any lights they might throw on the subject, and have been so ably and fully digested that nothing is left to this court but to extract from them the true principles, and to apply it to the case under consideration.

The policy of the law is clearly opposed to contracts between client and attorney in relation to property in litigation, and of which the latter has the charge, I think on the soundest reasoning. The value of the property we know depends almost exclusively on the certainty of the title; and from the nature of his profession, the attorney is supposed to be more competent to judge of it than the client. To discharge the duties which that relation imposes, his client must commit to him all the information he possesses on the subject. That relationship, too, begets the most unlimited confidence, for without it the client's rights are endangered; and to permit the attorney to use those means to the prejudice of the client would be to subject him to what is aptly enough termed a crushing influence.

The true rule I take to be this, that the law will not permit an attorney to avail himself of the circumstances arising out of that relation to make a contract relative to the property in litigation to the disadvantage of his client. But I do not think that it necessarily follows that every contract between persons

standing in this relation, and about such a subject-matter is absolutely void; nor do I think that such a conclusion is sustained by the current of decisions. Neither of the parties is supposed to be subject to any of those legal personal disabilities which incapacitate them from contracting, and *prima facie* they would be bound by their contracts; and when a rule of law is interposed to avoid, or to enforce its fulfillment if it is executory, on the maxim *cessante ratione cessat ipsa lex*, we are led to inquire whether the case is within the reason of the rule.

In this inquiry the jealousy with which the law views such a contract is ready to lend its aid in support of perhaps trivial circumstances tending to bring the case within the rule. But the danger to which the client is exposed, from the supposed influence which his attorney has over him, is the reason on which it proceeds; and the inquiry is, whether he has or has not used it to his prejudice; and if it should appear that the client was as well, or better, advised than his attorney on all matters connected with the contract which, without disparagement to the profession, does frequently happen, and has received a full and adequate price, where, I would ask, is the hardship or injustice of sustaining such a contract, although one of the parties should capriciously ask to be absolved from it? Surely there is none; and the rule never could have been intended to operate on such a case. This view of the subject is, I think, fully sustained by the reasoning of Lord Redesdale, in *Cane v. Lord Allen*,¹ when, in sustaining the judgment of the court, he remarks that Cane, the attorney, took no advantage of the confidence placed in him by Lord Allen, or of any superior knowledge of the value of the estate which he acquired as agent. And also by that of Lord Eldon, who in the same case remarks that it would be incumbent on the attorney to show that he had given the same disinterested advice that he would have done if the contract had been made with another party. In *Harris v. Treemenheere*, 15 Ves. 42, it is said that an attorney may purchase from his client; but to support such a purchase he must be able to prove that he paid the full amount that could have been obtained from any other person.

With respect to the cases on which the opinion of the chancellor appears to have been founded, it may be remarked that although from the generality of expression it is to be inferred that the isolated circumstance of the contract being between

1. 2 Dow. P. R. 299.

client and attorney was sufficient to avoid it, yet it will be seen upon an examination of the cases in which relief has been given that some circumstances entered into them demonstrating the influence which the relationship between the parties had over the contract, furnished either by some positive act of fraud or deducible from its inequality. I conclude, therefore, that all contracts between attorney and client, in relation to the property in litigation, are not necessarily void on the ground of that relationship; but that to render it so it must appear that it was used to the prejudice of the client. As a matter of proof it is impossible to lay down any rule as to what will or will not constitute sufficient evidence of it. It may consist in all the variety which exists between the most glaring and dishonest frauds, or be deduced from circumstances found in the twilight which separates them from perfect fairness, aided by the suspicion with which such contracts are regarded. These observations are not deemed necessary to the case under consideration, but were rendered so by a shade of difference between the opinion of the chancellor who tried the cause, and the views taken by this court, and to fix a principle which is involved in some difficulty.

The features of this case are, if the evidence is to be credited, too strongly marked to admit of any doubt in the application of the principle. The defendant did, it would appear, whilst his client was ignorant of the result of a cause in which the property was in litigation, participate in a contract by which the client parted with it at an inadequate price, and however disinterested his intentions might have been in a moral point of view, as a legal deduction it must be presumed that there was some cause operating on his mind; and in the absence of any other it will be referred to that which was intended to be guarded against by the rule; and this itself would be decisive of the case. But if the witness Carloss is to be believed, there are other circumstances which ought to weigh. For although he does not state that the defendant yielded to it, he does say that he suffered his ear to be polluted with the degrading proposition to throw cold water on his client's hopes.

The decretal order entered at the last court has not been carried into execution, and the possibility that the plaintiff may not think proper to give the security required as a condition precedent, has suggested the propriety of providing for that contingency; nor is the amount secured by defendant on account of the sale to Brown, either in cash or on bond, precisely

ascertained by the decree. The defendant has also advanced a sum of money on account of his contract with Carloss, and the complainant is indebted to him a bale of cotton by contract, as a fee for attending to the case against Harper in the constitutional court, which on every principle of equity and reciprocity he is entitled to have refunded and paid. But the propriety of allowing him a compensation for any services he may render as an attorney in any future case that may involve the title to the land is not seen, and is disallowed.

It is therefore ordered and decreed that the commissioner do state an account between the parties, debiting the defendant with the amount he may have received on the contract for the sale of the land to Brown, and what may remain due, and credit him with the amount paid on his contract made with Carloss, and the value of the bale of cotton; and that if the complainant shall, within one year after notice of the account so to be stated enter into bond with sufficient security to be approved by the commissioner, to indemnify and save the defendant harmless on account of his liability on his contract with Carloss to share any liability to which Carloss may be subject on his warranty on the sale to Brown, that then the defendant pay to the complainant the balance that may appear due on the account so to be stated, either in cash or by the delivery of Brown's bond for the purchase-money, if anything be still due and owing thereon. But if the complainant shall fail to give such security within the time aforesaid, then the bill to stand dismissed.

Decree affirmed.

See *Starr v. Vanderheyden*, 6 Am. Dec. 275.

BUSSY v. McKIE.

[2 McCORD'S CH., 23.]

EQUITY WILL NOT ENTERTAIN JURISDICTION merely to construe a will.

EQUITY WILL NOT ENTERTAIN JURISDICTION of a cause involving the title to land, where no discovery is sought nor partition asked, nor title papers alleged to be in the defendant's possession, nor other ground of equity alleged.

BILL in equity to obtain the construction of a will, under which complainants claimed title to the land involved. The bill prayed that defendants might be made to answer whether they did not enter upon the land with knowledge of the will, for an accounting of the increase and hire, and for a partition of

the premises among the complainants. An objection to the jurisdiction of the court was raised, and the chancellor, Desausure, dismissed the bill, but submitted the question for the opinion of this court.

Bauskett and Ford, for the complainants and appellants.

Thompson, contra.

By Court, NORR, J. The bill in this case contains various matters of which it is unnecessary that this court should take any notice, as the only question submitted to our consideration is that which relates to the land in the possession of the defendant McKie. The complainants claim as devisees under the will of their grandfather, Joseph Hightower, and the whole case turns upon the construction of his will. It is not pretended that the defendant has any title deeds in his possession, which are necessary to enable complainants to sustain an action at law. No discovery is sought; no ground of equity is alleged, other than that the construction of wills is a matter of equity jurisdiction; but a court of law is as competent to give construction to a will as a court of equity. It is said that the court has jurisdiction in all cases of partition. It will be time enough to decide that question when the case shall occur. There is no question in this case respecting partition. The complainants ask for the whole land, and not for a part. They do not admit that the defendant is entitled to share the property with them. The complainants had a plain and adequate remedy at law, and the bill was, therefore, properly dismissed.

The decree of the chancellor is, therefore, affirmed.

Decree affirmed.

GARRETT v. DAY.

[2 McCORD'S CH., 27.]

MISTAKE IN A FORMER DECREE is not conclusive upon the same parties in a subsequent action where the point to which the mistake referred was not in litigation between the parties in the prior cause.

BILL filed by John Day as administrator of James Day against John H. Garrett as administrator of Elizabeth Day. James and Elizabeth had been husband and wife. Prior to their marriage Elizabeth had been appointed administratrix of the estate of a former husband, William Hall, deceased. James succeeded to the administration in right of his wife, but died before he had fully administered. Elizabeth and John Day were appointed

his administrators. Elizabeth soon after died, and an action was then brought by Garrett and wife and the other children of Hall, against John Day, James' administrator, for their distributive portions of Hall's estate, and by reason of a mistake of fact, that James had survived his wife Elizabeth one third of her interest in Hall's, her father's estate, was allowed to be retained by John Day.

The present bill was for an accounting of property bought by Elizabeth at a sale of James Day's estate. The question of John's right to retain the sum by mistake decreed to James in the former proceeding was raised and decided by the chancellor against Garrett, as administrator of Elizabeth; whereupon he appealed.

Bauskett, for the appellant.

Butler and Thompeon, contra.

By Court, COLCOCK, J. The question presented for our determination is, whether John Day, as administrator of his brother's estate, shall be allowed to retain in his hands the one ninth of William Hall's estate, which was decreed to him in the decision of the first case, on a mistaken view of the facts of that case. That the facts were mistaken admits of no doubt. It is shown to the court by John Day himself, who is now filing a bill against John H. Garrett as the administrator of Elizabeth Day, to account for property purchased by her at the sale of her husband, James Day's estate, and in the decree delivered by Judge James at the May sitting of the court of appeals of 1823, he states expressly, that the wife died before the husband.

It would be difficult to meet the justice of this case if the parties stood before us in the same situation in which they stood before the court which made that decree. But their situations are materially changed, and, therefore, I think justice can be done without any violation of those wholesome and well established rules by which parties are prevented from reinvestigating the judicial decisions of the country. John Day is now the applicant to this court to compel John H. Garrett to do equity; and I think we have a right to say, "We will not aid you without requiring that you yourself shall also do justice. It is true that you have obtained a decree for one ninth of William Hall's estate; but you show us that it was improperly obtained, perhaps not by fraud, but clearly by a mistake." But it is replied, the mistake might have been rectified by the present defendants. They rejoin, "It was not incumbent on us to do so on that

occasion; for we were then asking for our share of our father's estate, but now we are asking for our share of our brother's. Then we received all, and perhaps more than we were entitled to, as our portion of our father's estate. We had nothing to complain of; what you withheld was a part of our mother's share of her husband's estate, which we were not then claiming, and which could not have been adjudged to us; first, because it was not asked for, and secondly, because no administration was granted to us of her estate."

It is contended by the complainant's counsel that if the sum be allowed to the defendants, it will be reversing the decision of the former court; but it is not so in fact. The decree stands, we do not pretend to reverse it. We say to the complainant, "You have obtained a decree by which the rights of one not before the court were affected. That which you claimed for your brother was your sister's; and although you then had a right to withhold it from the defendants, you have no such right now." To illustrate this matter further; suppose a proper view of the facts had been taken at the time of the first decision. Hall left some children and a widow; the children were entitled to two thirds of his estate, and no more. And this was the only question which the court were called on by the pleadings to decide. The widow was entitled to one third, but whether James Day, her second husband, had acquired a right to the whole or only to a part of her third, was not a question made; and the determination on that point was gratuitous, extra-judicial, and made on a mistaken view of the facts. James Day had not so reduced to possession his wife's portion of her first husband's estate as to be entitled to any part of it, and he died before his wife; so that her rights remain as though she had never been married to him. Her representatives are now entitled to the third of their father's estate which belonged to their mother; consequently, the sum which John Day retained as his brother's is now the property of the defendants. As to what disposition the administrator may make of the property which may come into his hands, is not now a question to be considered by the court.

The decree of the chancellor is reversed, and the accounts again referred to the commissioner, to be adjusted on the principles of this decree.

Decree reversed.

THOMAS v. SHEPPARD.

[2 McCORD'S CH., 26.]

EQUITABLE PROVISION FOR THE WIFE will be decreed where the husband resorts to equity to obtain possession of his wife's property; but not where he has had possession and has incumbered it, will equity disincumber it, and settle it on the wife.

BILL in equity seeking to enjoin defendant from seizing under an execution property which was in the possession of Thomas, in right of his wife, and against which Sheppard was proceeding under a judgment confessed by Thomas in his favor. The note on which judgment had been confessed was given as the purchase-price for certain negroes. The bill alleged fraud in procuring the note and the judgment, and sought to set aside the contract on the ground of Thomas's imbecility of intellect. The second position was not sustained, and in regard to the other, Thompson, chancellor, ruled that fraud had not been established, but decreed that, as the land and personal property involved had been derived by the complainant from his wife, a young and inexperienced girl, all the realty and personalty belonging to her at the time of her marriage and now in Thomas's possession be settled upon her in trust, and that Sheppard be perpetually enjoined from further proceedings against the same, at law or in equity. Defendant appealed.

J. J. Caldwell, for the appellant.

O' Neall, contra.

By Court, COLCOCK, J. In this case, the court concur with the chancellor in that part of his decree by which he refuses to annul the contract entered into between the complainant, John Thomas, and the defendant, William Sheppard. It does not appear that Thomas is so deficient in understanding as to be incapable of making a contract; and the circumstances of fraud and imposition stated in the bill are positively denied, and were not supported by the proof adduced by the complainant. The bargain was an injudicious one, and the consequences will be distressing; but that is not a ground of relief.

The decree, however, so far as it directs a settlement of the wife's estate on her, must be set aside. Where a husband's claim to his wife's property must be asserted by suit in equity, if there be no agreement between them previous to marriage, it is an established rule, though, as some have thought, of doubtful policy, that the husband will not be al-

lowed to obtain the possession of it, without making a provision for her: 1 Madd. Ch. 386; 1 Roper on Husband and Wife, 256. But where the husband is in the actual possession of the property, and has even imprudently incumbered it with judgments and executions, it is not in the power of the court of chancery to rescue it from these legal liens of his creditors, and settle it on his wife. The rule which is laid down as to the husband is carried so far as to apply to his voluntary assignee, and even to a purchaser for a valuable consideration of the wife's interest from the husband, who are compelled to come into court to assert their rights; and this, I think, is going far enough; but it will be remarked that it is not interfering with vested rights, with those liens which are created by the operation of the law, acting directly on the property in the possession of the husband. The court says to these claimants: "You have brought no other right than the husband would have had. Had he applied, we should have required him to make a settlement, and we, therefore, require you to do the same; the property was subject to this equitable lien." And such is the first case referred to by the complainant's counsel, *Kenny v. Udale*, 5 Johns. Ch. 464, in which Chancellor Kent takes a most extensive view of the whole subject, and refers to a number of cases, in all which, it will be observed that the aid of the court was necessary to obtain the right, or the wife was a ward of the court, or the property vested in trustees.

The counsel, however, have referred to some cases which do certainly approach nearer to the present, but in which there is an obvious ground of distinction. I say some cases, though they, in fact, are the same cases. The same complainant, at different times, claims the protection of the court against the creditors or assignees of her husband. The first is *Haviland v. Myers*, 6 Johns. Ch. 25, and the other, *Haviland v. Bloom and Myers*, Id. 178. In these cases, the wife had obtained, as is stated in the second case very fully, a divorce from bed and board, and the court is directed in such cases, by the statute authorizing divorces, to make orders for the suitable support and maintenance of the wife and children, out of the husband's property; but he having none, the property which came to the wife from her father was settled on her. In the first case, it is said the husband had commenced ejectments to recover the land, and was seeking to recover her personal property. And in both cases it is stated that the fact of the husband's having abandoned the wife was known. Now, although a lien is spoken of in this case as being

created by the judgment, yet it is clear that the property never was in the possession of the husband, and the attempt to levy was after the decree settling the purchase on the wife. In page 180, the chancellor says: "This decree of divorce was known to each of the defendants before they caused executions on judgments against Haviland, to be issued and levied on that estate. This is understood to be a fact admitted by their answers." So that the marital rights of the husband were destroyed before the levy. It is expressly said by all the writers on this subject, that if the husband has acquired the possession of the property the court will not interfere, and some have gone so far as to say, can not interfere: 1 Madd. Ch. 387; Clancy on the Rights of Married Women, 190. Here the defendant is in possession. It is said he entered as tenant to his mother-in-law, but on her death, the descent was cast on his wife, and he surely was no longer tenant under the lease.

Everything which relates to the doctrine of supporting this equitable claim of the wife admonishes us as to the caution necessary in the applications of it. When we inquire into its origin we are informed that it is sufficient to know that it is a settled rule of the courts of equity, and that it has been acted upon from a very early period. Lord Eldon calls it "a mere creature of the court, founded altogether on its practice." And it is said no one who looks to the object of it, and observes its application, can doubt that it has introduced a wholesome qualification of the common law. The late master of the rolls, Sir William Grant, in the case of *Murray v. Elibank*,¹ says: "With regard to this equitable right which a married woman has in this court to a provision out of her own fortune before her husband reduces it into possession, it stands upon the principal doctrine of this court. It is in vain to attempt by general reasoning to ascertain the extent of that doctrine; we must look to the practice of the court itself." And Lord Hardwicke, speaking of it, says: "That it resembles the paternal care which equity exercises for their benefit; and that as a father would not have married his daughter without insisting on some provision, so equity, which stands *in loco parentis*, will not do it;" in which language there is discoverable a considerable limitation to the exercise of the power. It is the power of a judicious parent.

Now, although I am ready to acknowledge that the exercise of such power is wise and proper, and that it may be consid-

1. 10 Ves. 90.

ered in the hands of the court as a wholesome modification of the common law, and may on proper occasions be well applied to the relief of unfortunate females, yet I am not disposed to become a knight-errant in their cause.

The decree is, therefore, reversed so far as it directs a settlement on the wife, and in other respects affirmed.

Decree modified.

McDOWELL v. CALDWELL.

[2 McCORD'S CH., 43.]

THE SURETY OF A GUARDIAN is liable for moneys in the guardian's hands at the time of the execution of the bond, though received previously, as well as for moneys subsequently collected.

ON THE BREACH OF THE CONDITION OF A BOND, the penalty becomes a debt by specialty.

WHAT WAS INTENDED AS A GRATUITY, can not be converted into a demand.

A guardian who invites his minor wards to live with him gratuitously shall not be permitted to charge them for board. For clothing and other necessities furnished them he may be reimbursed.

A GUARDIAN CAN NOT USE THE CAPITAL of the ward for his subsistence except under peculiar circumstances.

A GUARDIAN WILL NOT BE ALLOWED INTEREST on moneys advanced beyond his ward's income.

A GUARDIAN IS ENTITLED TO REIMBURSEMENT for expenditures incurred in prosecuting a claim of his ward.

THE COMPENSATION OF A TRUSTEE should be put at the lowest estimate where the transactions of the trust are involved in obscurity, which might have been removed by a proper attention to duty.

BILL in equity filed by the wards of one William Caldwell against his administratrix and his surety, praying that the amount he should be found in arrear might be charged against the estate as a bond debt and paid accordingly, and that the surety be made responsible for any deficit. The facts of the case sufficiently appear from the opinion.

O'Neill, for the complainants and appellants,

Dunlap and J. Caldwell, contra.

By Court, JOHNSON, J. The matters of law arising out of this case will be considered with reference to the following points, without regard to the order in which they are set down in the brief. They are:

1. Whether a surety to a guardianship bond is liable for funds in the hands of the guardian at the time the bond was executed;

2. Assuming that the estate of William Caldwell, the deceased guardian, is insufficient to pay all his debts; whether in marshaling the assets, any balance that may be found due on the settlement of his accounts as guardian is to rank as a bond or simple contract;

3. Whether, under the circumstances, the defendants are entitled to a credit on account of the subsistence of Charlotte and Elizabeth McDowell;

4. Whether the defendants are entitled to be credited on account of board and expenditures for clothing and tuition of James and Alexander McDowell ascertained by a conjectural estimate, without proof of actual expenditure, and to an amount exceeding their annual income.

As to the first point, it was satisfactorily proved that William Caldwell, the guardian, in the interval between the order for his appointment and his entering into bond, received a sum of money from Harris and Bowen in part payment of a bond, and the decree allows it as a charge upon his estate, but not against the surety, because it came into his hands before the surety was bound; and these circumstances give rise to the first of the foregoing propositions. The guardianship was general. It committed to William Caldwell the management of the whole estate of his wards, and his bond was intended as security for the discharge of his duty, with respect to the whole. Of this, the funds in his hands constituted a part. His appointment was consummated by his entering into bond, for until then he had no powers. In virtue of it he had a right to detain the funds in his hands, and on every principle of justice and reason the bond must stand as a security for the manner in which he dispose of it. The sums received on this account must be charged to the surety, whether they were received before or after the execution of the bond.

Connected with this matter a contest has arisen whether in point of fact the complainants were entitled to certain sums received by their guardian from John Collins and James Blocker, and on account of land sold to Drummond. The first of these only is allowed, and that only as a charge upon the estate of William Caldwell, and not against the surety. Whether William Caldwell received these sums as agent for the executors of Patrick and Alexander McDowell, or on account of his wards, is left in some degree doubtful by the evidence; nor have I been able to distinguish between the character of the evidence in relation to these items, nor to comprehend fully the reasons

which led to the allowance of one and the exclusion of the others; and under these circumstances it has been thought most advisable to send them to the commissioner for further evidence, with directions to charge them to the account of the guardianship bond, until they should be found to have been received on account of the plaintiffs; and it is ordered accordingly.

As to the second ground, by the common law, if the condition of a bond was broken, whether it was for the payment of money or for the performance of covenants, the penalty was forfeited, and became a debt by specialty; and although equity has always relieved against it, and although by statute, courts of law are authorized to do so, yet I apprehend that the legal character of the debt has not been changed. The penalty still remains a debt by specialty, and stands as a security for whatever may be found due on the condition, and is entitled to rank as such in marshaling the estate of William Caldwell.

As to the third ground, the proof is very conclusive that there was no intention on the part of William Caldwell to charge his wards, Charlotte and Elizabeth McDowell, with board, and that it was so understood at the time they took up their residence with him. The relation of brother-in-law, in which he stood to them, the well-known liberality of his feelings, the kind attentions which he bestowed on them, added to the positive evidence of Mrs. Caldwell, establish it beyond controversy. Indeed, the reasoning both of the chancellor and the commissioner indirectly admits it, and a forced construction has evidently been resorted to for the purpose of charging them with it as a relief to the surety, John Caldwell. But when we reason that it is unjust, that a principal should be liberal at the expense of his surety, we see but one side of the picture of this case. These young ladies had been invited by Major Black and Mrs. Watts, their relations, whose respectability and ample means promised all that could be expected, to take up their residence with them, free of any expense on account of subsistence. They were seduced by this offer by the entreaties of a sister; and the assurances of her husband that he would accord them the same terms. To charge them with board under these circumstances would not only be a violation of the rule that what was intended as a gratuity shall not be converted into a demand, but it would amount to positive fraud. It has been further urged that the invitation could not have contemplated a residence so protracted as this proved to be, and that for that reason it should be limited to one year. The undertaking was voluntary, and im-

posed no obligation on William Caldwell further than that it was executed; and if he found it onerous, he might at any time have put an end to it, but until he did so the original conditions remained. This view of the subject is not, however, intended to exclude any demands for money expended for clothing, or other necessities suited to their condition and circumstances in life; for these they are clearly accountable.

With respect to the fourth proposition, the facts appear to be these: The complainant, Alexander McDowell, and his deceased brother, James McDowell, had been put out apprentices to trades, but on funds coming into the hands of their guardian, he removed them from their occupation and put them to school. They resided with the guardian a part of the time, and at other times were boarded abroad, but no account has been furnished of the actual expenditures, or of the length of time they were boarded abroad; and the basis of the charge against them is by probable conjecture as to what would be the expenses of board, tuition, clothing, etc., for the whole length of time. It is a well settled rule that the guardian is not entitled to break in upon the capital of his ward for his subsistence, except under peculiar circumstances, which do not enter into this case, and generally it is limited within the income. Of course there could not be a balance against the ward at the end of the year, on which interest could be calculated; and for this reason, as a general rule, interest is not allowable on a balance due for subsistence. The liberality of the complainants in consenting that a reasonable allowance should be made for the board of those young men, without regard to their income, has relieved the court from the necessity of applying these principles to the case further than is applicable to interest on the annual expenditures. This, for the reasons before mentioned, cannot be admitted, and the account for their board and subsistence will be retained, expunging the interest which has been calculated on it.

With respect to the matters contained in the seventh ground of the complainant's motion, it may be remarked that they present a proposition too clear to admit of any doubt. If the expenses of the suit of *Black et al. v. Junkin* were incurred in prosecuting the rights of the complainants, and have been paid by their guardian, he is entitled to be credited with them, and so with regard to the expenses on account of the lands sold to Drummond. If the proceeds of this sale belonged to complainants, of course they are chargeable with the expenses, but if

otherwise, they clearly are not. Whether they are or are not entitled to this fund is one of the facts referred back to the commissioner, and their liability must depend on the determination of that question.

This disposes of all the points made on the part of the complainants, and it will only be necessary to notice very briefly those made by the defendant. The first ground stated in his brief is disposed of in considering the second general proposition arising out of the complainants' motion, and without abandoning the question of law arising out of his second ground. Mr. John Caldwell, who is the party and the counsel has consented to waive it, and that the amount charged to have been received from Mr. Cheves shall be retained. His third ground involves a question of fact only, and for that reason this court would reluctantly interfere with it; but connected with it is the circumstance that no accounts have been kept or exhibited as to the actual expenditures; and if a person who stands in a fiduciary relation will suffer his transactions to be involved in obscurity, when by a proper attention to his duty and the interest of his *cestui que trust* he might have removed it; if he is entitled to any remuneration it furnishes a good reason for putting it on the lowest estimate. The court are perfectly satisfied with the deduction made by the chancellor on account of the board of the young men.

It is therefore ordered that this case be referred back to the commissioner to examine into the matters left open by this decree, and to state an account between the parties conformably to the principles laid down.

Decree modified.

COLEMAN v. SHELTON.

[2 McCord's CH., 126.]

THE LIEN ON PERSONAL PROPERTY left in pledge or subject to an equitable lien, may be enforced in equity, if the property has been taken by the debtor from the pledgee. At law the lien incident to a pledge depends upon possession.

BILL in equity. Shelton, being indebted, pledged a negro with the creditor to work out the debt; he, Shelton, applied to Coleman to advance to the creditor the amount of the debt, and take the negro on the same terms. This was done. But Shelton enticed the negro from Coleman's possession, and threatened to move away with him. The bill prayed that the negro might be

sold for the amount of complainant's demand, and that defendant be restrained from departing with the negro.

THOMPSON, Chancellor, dismissed the bill for want of jurisdiction.

Pearson, on behalf of the complainant, appealed.

By Court, JOHNSON, J. The leading object of this bill is for relief; so that in considering the question of jurisdiction, the case made by the bill will be exclusively regarded, without reference to the matters which arise out of the answer. In theory the law provides a remedy for any wrong which one man can inflict upon another, and a branch of equity jurisdiction, founded on this theory, has grown up on account of the inaptitude of the proceedings of a court of law to supply a remedy suited to the precise injury, in a variety of instances; and hence, the rule that equity has jurisdiction in all cases where the party injured has not a complete and adequate remedy at law.

There can be no doubt that, by the terms of the contract set out in the bill, the complainant had a right to the possession, and a lien on the negro for the amount advanced; but it is contended, in opposition to this motion, that the complainant has a complete and adequate remedy by an action of assumpsit, or trover, or detinue, and that therefore this court can not entertain jurisdiction of the cause. It is amongst the peculiar incidents attached to a pledge or pawn, that the lien created by it depends on the possession of the thing pawned or pledged, and remains so long as the possession continues and no longer: 1 East, 4; 7 Id. 5; 3 T. R. 119; 4 Johns. 112. Now, it is very clear that neither the action of assumpsit nor trover will restore the complainant to the lien to which he is entitled by the terms of the contract, and of which he has been deprived by the act of the defendant. A recovery would place him on the footing of a general creditor, but his lien is gone; and in the event of insolvency, he would lose his remedy. The same reasons apply to the remedy by action of detinue, if that action can be maintained; the judgment there is in the alternative, either for the thing in specie or damages; and whether this would or would not prove adequate, would depend on contingencies, about which the court ought not to drive the complainant to speculate, as he must do so at the hazard of an entire loss in the event of insolvency, which is positively alleged in the bill. The wrong complained of in this case is, that the complainant has been,

by the act of the defendant, deprived of a security which he held under a contract with him for the payment of a debt. And it is apparent that none of the remedies before alluded to are calculated to restore him fully to his rights; nor am I aware that the courts of law furnish any that will. To the court of equity he must therefore resort.

I have not been able to find any case, nor has any been cited at the bar, which can be regarded as directly in point. The books do, however, furnish cases which bear, I think, a strong analogy. The case of *Kruger v. Wilcox*, Amb. 252, is of this class. There Lord Chancellor Hardwicke remarks, that he had been unable to find any case at law where a factor, who had parted with the possession of goods on which he had a lien, was allowed to retain it where the goods had been turned into money; but he adds: "I have no doubt it would be so in this court if the goods remained in specie; nor do I doubt its being so where they are turned into money." In the case, *Ex parte Emery*, 2 Ves. sen. 674, a factor was held to retain a specific lien on goods, although he had parted with the possession. Now, although the question of jurisdiction did not arise in these cases, they ascertain rights for which the courts of law furnish no adequate remedy. A court of law could not restore his possession and lien on the goods, nor follow their proceeds, when converted into money, and consequently equity must, according to the principle, retain it. The case is therefore ordered back to the chancellor to be tried on its merits.

COLCOCK, J., dissented without assigning reasons.

Decree reversed.

SMITH v. DANIEL.

[2 McCORD'S CH., 143.]

EQUITY HAS JURISDICTION TO RESTRAIN a tenant for life from wasting the property, or to compel him to give security to have the personalty forthcoming at the termination of the life estate.

THE TENANT FOR LIFE IS A TRUSTEE for those in remainder.

A PURCHASER FROM A TRUSTEE, with knowledge of the trust, takes subject to the trust.

THE TRUST MAY BE ENFORCED AGAINST A PURCHASER without knowledge thereof, where he still retains the property in his hands. But it is otherwise where he has parted with the property.

A REMAINDER-MAN CAN NOT OBTAIN SECURITY of the tenant for life where there is no danger of the latter's insolvency, nor any reason to fear his departure or disposal of the property.

BILLS IN EQUITY filed by a purchaser for purposes of speculation are not favored.

BILL in equity filed to obtain security from defendant for the production and delivery of a slave upon the termination of a tenancy for life in such slave, in one from whom the defendant had purchased. The complainants were the remainder-men and purchasers under them. The bill alleged that defendant had carried off the negro for the purpose of defeating complainant's recovery. The chancellor, Thompson, decreed that the defendant give a bond with security, for the forthcoming of the negro and her increase, on the termination of the life estate.

Defendant appealed.

Henry and Earle, for the appellants.

A. W. Thompson, contra.

By Court, **NORR, J.** I have no doubt of the power of the court of equity to restrain a tenant for life from committing waste, or to require him to give security to have personal property forthcoming at the termination of the life estate. A tenant for life is considered in the nature of a trustee for those in remainder, and the court may, therefore, take all the necessary steps to prevent or restrain an abuse of his trust. And when a person purchases, with a knowledge of the situation of the property, he takes it coupled with the trust, and will be considered as standing in the same relation to the party.

But it is not even alleged in this case that the defendant, at the time he made the purchase, knew that the vendor had only a life estate; and he positively denies in his answer that he had any such knowledge. But, nevertheless, if he had the specific property now in his possession, and there was no reason to apprehend that he was about to remove it out of the limits of the state, I have no doubt that, even in that case, the court would subject the defendant to such terms as would render the complainant secure; but the defendant in his answer swears that he had parted with the property long before the bill was filed; he can not, therefore, be required to give security to produce the property itself, and that is all the complainant requires. The decree, therefore, goes beyond the prayer of the bill, in giving to the complainant what he does not ask. But it does not appear to me that if they had specifically prayed for the relief which has now been granted, that it ought to have been allowed. A person who has purchased a life estate may sell it again unless re-

strained while the property is in his actual possession; and he can not be made answerable for the act of another over whom he has no control. And it does not appear to me that he can be made liable for property which thus passes through his hands. But even admitting that he may be ultimately liable, still I do not think that the complainants have made out a case which entitles them to the relief that is sought for. They do not pretend that they are in danger of suffering by the insolvency of the defendant, or otherwise. On the contrary, they state that he is wealthy. There is no reason to apprehend that he is about to remove away, or dispose of his property. If he is responsible at all he will continue to be so when their right accrues. Besides, I do not see anything in this case to entitle the complainants to any particular favor. Their ancestor in the first place fraudulently imposed upon this defendant in the sale of the property. Thirty years have elapsed and no steps have been taken to compel him to perform his trust; and now an attempt is made to make this defendant liable for his fraud. And it is further to be remarked that the bill is now filed by one who admits that he has purchased upon speculation, and has undertaken to maintain the suit for one half of what he can recover. I do not think, therefore, that he comes with very strong claims upon the discretion of this court, to afford him this extraordinary remedy, which should be allowed in any case with extreme caution. I am of opinion, therefore, that the decree ought to be reversed.

I observe that the bill also claims a discovery and prays for the perpetuation of testimony. And it is stated that there is an amended answer which is not before us. Whether those matters furnish any ground for retaining the bill I do not know; of that, the chancellor must judge. If they do, let the bill be retained until those questions shall be disposed of; if not, let it be dismissed, with costs.

Decree reversed.

TEAGUE v. DENDY.

[2 McCORD'S CH., 207.]

THE SURETIES ON AN ADMINISTRATION BOND must be sued at law; the remedy against them is not in equity.

AN ANSWER TO THE MERITS does not deprive the defendant of any legal objection insisted on in the answer.

TO A BILL FOR AN ACCOUNT, an administrator whose letters had been revoked, may show that he had fully settled with his successor.

DISTRIBUTORS' RIGHTS ARE GOVERNED by the state of things existing at the ancestor's death.

ADMINISTRATORS SHOULD CONFINE THE MAINTENANCE of the children to the income of the estate; nor should they exceed it, except in cases of necessity, upon application to the court.

MODE OF CALCULATING INTEREST on funds received in the course of administration.

ADMINISTRATOR WILL NOT BE ALLOWED EXPENSES incurred in the ordinary course of administration; for expenditures made in procuring services which the administrator could not be supposed competent to render, he will be reimbursed.

BILL in equity to obtain an accounting from the several administrators of the estate of William Dendy. The sureties were also made parties defendant. The case came before the court on sundry exceptions to the report of the commissioner. These exceptions appear from the opinion of the court.

O'Neill, for the complainants.

Irby, contra.

By Court, JOHNSON, J. Before entering into the several questions which have been made on the part of the complainant, it will be necessary to dispose of the objections which have been raised on the parts of the defendants, Gallanus, Andrew and D. M. Winn, who stand in the relation of sureties only to the administration bond. The defendant, Patsey Dendy, has not answered; nor has she rendered any account of her administration; and these defendants in their answer go into an account; but they insist in the conclusion, although they have fully answered in the bill, "this court ought not to take cognizance of the matter, because the complainant has an adequate remedy at law against them on the administration bond," and pray the same benefit from this objection as if it had been specifically pleaded, etc.

In the case of *Hoit v. Blanchard*, 4 Desau. 25¹, the court lays it down that a suit in equity can not be maintained against the sureties on an administration bond, and that the remedy against them is at law; and in the latter case of *Glenn v. Connor*², decided in the court of appeals at the December term, 1824, the court confirmed the decree of the circuit judge dismissing the bill as to the sureties of an administration bond. That was a case going all fours with this. There the administrator had neglected to put in an answer. The sureties did answer; and, as in this case, insisted on the objection by way of defense, and

1. *Hoell v. Blanchard*, 4 Desau. 25.

2. Harp. Eq. R. 267.

Chancellor Desaussure remarks that the decision was in conformity with the decided cases and was founded in reason and justice.

I have labored to get rid of the objection raised in this case, believing that it was to the interest of these defendants, if they were in danger of ultimate liability, that they should be in court to investigate their accounts, as their principal had neglected to do so; and I at one time thought that the circumstances of their having accounted would enable me to do so; but it is a well settled rule of practice that an answer to the merits does not deprive the defendants of any legal objection insisted on in the answer. We are bound by the decided cases, and it is the defendants' own concerns how far they will be affected by it. As to them, therefore, the bill must be dismissed.

On the part of James Young it is insisted that the bill, as to him, ought to be dismissed, on the ground that he had fully settled with Patsey Dendy, his successor, all his actions and doings after the revocation of the administration granted to him, and whilst she was the sole administratrix. There is no doubt of the correctness of this position. It was his duty on the revocation of the administration granted to him, to pay over the funds in the hands of his successor, and if he had done so, and obtained a release, he would have been discharged; but the evidence on this subject has not been reported, and it is impossible that we can judge of the fact. It was suggested in the argument, that it had been ascertained that some mistake had occurred in that settlement, which, if corrected, would show that a balance was still in his hands. If that is the case, he is still liable, notwithstanding the settlement and release. Having disposed of these questions, I will now proceed to consider the grounds taken on the part of the complainant:

1. That the commissioner ought to have been directed to charge the estate with the maintenance of the children, before he deducted the widow's distributive share. It is evident that this objection to the decree has originated in confounding the administration of the widow with her interest in the estate. The rights of the distributees are controlled and limited by the state of things that existed at the death of the ancestor; and if the administration in this case had been granted to a stranger, it never would have occurred to any one, that the distributive share of the widow was to be withheld until the children had been maintained and educated; for the grant of the administra-

tion to her could not impair her rights. This objection was, therefore, properly overruled.

2. That the commissioner ought to have been directed to set apart the income of the estate for the maintenance of the children, and allow nothing beyond it. In the case of *McDowell and others v. The Administrators of Caldwell*, decided at the sittings in January last, the views of the court on this question are fully expressed. A prudent man would always proportion his expenditures in such a manner as to bring them within his income; and the law imposes the same obligation on him to whom it confides the management of the affairs of others. Cases may and frequently do occur, in which prudent men are, from necessity, compelled to depart from this rule; but they are out of the ordinary course of events, and before the court will permit a guardian, trustee, executor or administrator to break in upon the capital for subsistence, it will require them to show clearly and distinctly its necessity. In cases of urgent necessity, the court would not hold from the administrator the power of exercising a discretion over the subject; but generally it claims the right to be consulted as to the expediency before the act is done, when application can be made without defeating the object. In this case, as in that of *McDowell v. Caldwell*, no account had been kept, and no vouchers were produced to show the amount of disbursements on account of maintenance, and the defendants go into a conjectural estimate of what might have been the probable amount; and in the result it appears that they have not only swallowed up the income, but a large portion of the capital. This is inadmissible, and in this respect the decree must be reformed.

3. That the commissioner should have been directed not to allow interest on the allowance for maintenance. Referring to the case of *Wright v. Wright*, decided during the present term,¹ for the general rule as to the mode of calculating interest, it will be sufficient to remark in reference to this case, that the mode of calculating interest is to deduct the credits at the time the payments or disbursements were made from the sum in hand, whether it consists of principal, interest, or income; and the remainder constitutes the balance due. See the case of *Black v. Blakely*, 2 McC. Ch. 1.

4. That the commissioner should have been directed to deduct from the funds in the complainant's hands a counsel fee of one hundred dollars, for the case of *Teague v. Dunlap*, and

1. 2 McC. Ch. 185.

the present case. It is not seen how the defendants are interested in that question. When the complainant is called on to account for his own administration, it will be time enough to inquire into the merits of this claim.

5. That the commissioner should have been directed to charge interest on the whole amount of funds in the hands of the administratrix, and not on the annual balance only. And here again I must refer to the case of *Wright v. Wright*, for the rule. If the current expenditures of the year exceeded the income, the balance, of course, must be deducted from the principal, and interest on the remainder could only be charged to the defendant. And if, on the contrary, the income exceeded the expenditure, the excess became principal, on which the defendant was chargeable with interest.

The sixth and last ground of objection is, that the commissioner should have been directed to disallow the charges for extra expenses in settling with the bank, and the charge for the maintenance of old Bob. With respect to the extra expenses of settling with the bank, it may be observed that the undertaking of the administratrix was to discharge all the duties that devolved on her in that character; and if these expenses were incurred in the ordinary course of administration, the compensation allowed by law was intended to cover it. It is, for instance, the duty of an administrator to keep and render a just account of his administration; and if he is incompetent or too indolent to do so, and thinks proper to keep a clerk or employ an accountant for that purpose, he must do it at his own expense. There is, it is true, a distinction between those services for which a compensation is allowed by the statute and the expenses incurred in the course of the administration. The former referred to those duties which an administrator is supposed to undertake, and the latter to such as require the aid of professional skill, to which he is not supposed to be competent. The conduct and management of a lawsuit is an illustration of the latter.

It does not appear, however, that the settlement with the bank involved any difficulty, or required the aid of counsel. That charge was, therefore, improperly allowed. The defendant's third exception relates to the support of a useless old slave, named Bob. The commissioner allowed the administrator for his support. The chancellor says, in his opinion, most justly: "To refuse it would be to compel executors and administrators to be guilty of gross inhumanity. The estate was

bound to support an old, worn out slave. The administrator did his duty and he must be allowed the charge.' This court concurs with the chancellor.

The case is ordered back to the commissioner to settle an account between the parties, conformably to this opinion.

Case sent back to the commissioner.

MYERS v. MYERS.

[2 McCORD'S CH., 214.]

IN CONSTRUING WILLS, THE INTENTION must govern. The intention must be collected from all parts of the will taken together, and not from particular parts or expressions.

PERSONS BORN AFTER THE DEATH OF THE TESTATOR can not take under a legacy to a class, unless there is a fixed period for the distribution. Where the period is indefinite, only those *in esse* at the testator's death can take.

IDEM.—Nor will a future definite time for distribution be inferred from directions regarding the falling in of an inconsiderable life-estate of a legatee; nor will the arrival of the legatee at the age of twenty-one years be considered the period for distribution simply from the provision in the will relative to his education.

GIFTS MADE PER VERBA IN PRÆSENTI vest in those only who are then *in esse*.

MAINTENANCE OF CHILD OUT OF HIS ESTATE will be allowed where he is wealthy, and his father is in indigent circumstances.

A DEVISE OF "ALL MY LANDED ESTATE," followed by a description of several tracts of land, will not pass a lot not described.

A TRUSTEE WILL BE REMUNERATED for necessary improvements rendering permanent benefit to the estate of the beneficiary.

A TRUSTEE MAY NOT EMPLOY THE TRUST FUND for his own benefit. Principle applied to the case of an executor who had mixed the assets of the estate with his own property, and had invested them.

A TRUSTEE'S REFUSING TO ACCOUNT furnishes a good reason for adopting against him the most rigid rule of calculation.

COMPOUND INTEREST MAY BE ALLOWED in some cases.

BILL in equity. The questions in this case arose upon the construction of Jacob Myers' will. The defendant, David Myers, was his executor and only son. Among the provisions of the testament were the following: "I give and bequeath unto my dear and beloved grandchildren, being the lawful issue of my dear son, David Myers, to them and their heirs forever, all my landed estate, which consists together of three thousand seven hundred and fifty acres, etc.;" then followed a description of various tracts, among which one in Columbia was

not mentioned. The will provided the manner in which the said land should be divided among the grandchildren, and by another clause directed the personalty to be equally distributed among them share and share alike. The fourth item was: "I give and bequeath unto my dear and beloved son, David Myers, one shilling sterling as full compensation, and as his full share of all my estate, both real and personal." The seventh item provided for a life-estate in a certain negro woman in favor of one Mrs. Dutilly, upon whose decease the negress was to become part of the personalty, as devised to the grandchildren. The eighth item was: "I hereby appoint and constitute my dear and beloved son, David Myers, to be sole executor of this my last will and testament; and do hereby direct him to call in all and every of my outstanding debts, and to pay all and every of my just debts, dues or demands that I may be justly indebted; but at present I do not recollect of any, in consequence I leave a clear and valuable estate to his management; and earnestly exhort him, my said dear son, David Myers, to be a true and faithful guardian and protector of this valuable property, which is for the sole benefit, in the end, of his dear children. I request him to have them well educated out of the profits arising from this estate now bequeathed unto them; for a good education is a valuable blessing; and I now earnestly recommend him, his wife, and his dear children to the protection of Almighty God."

At the execution of the will, the son David had two children born, the complainant, Dr. John Myers, and the defendant, Mrs. Clendenin; his wife, being then pregnant, was delivered of another son, the defendant, William Myers, previous to the death of the testator. Since the testator's death, and before the filing of the bill, David had six other children born.

It appeared in evidence that David, the executor, had kept no accounts, but had mixed the property of the estate with his own, and had invested the whole, realizing very largely. At the time of entering upon the trust, David was possessed of little or no property, but he now had an immense estate which he claimed as his own, mingled with his trust estate. The executor, in his answer, contended that he had a right to manage the estate as he saw proper during his own life-time; that he intended to divide the entire estate among his children at his death; and that it was not the intention of his father, the testator, to have it divided before that period, at which time all such children as he might then have would be entitled to come

in for their portion under the will. At the time of making the will, the testator had a lot in Columbia, which was not mentioned in the will. The complainant contended that it passed under the first and last clauses of the will, and that David was excluded from taking anything by reason of the fourth clause. By consent of parties, a certain annuity was set off to Dr. John and to William, pending the result of this suit, they both being of age and married.

Upon the hearing of the cause, the following points were made: 1. Were the children of David Myers, born since the death of the testator, entitled under the will with those born before his death? 2. Whether the lot in Columbia was included by the will, or whether it descended, as undevise, to David Myers? 3. Whether the defendant, David Myers, should be allowed for the education of the nine children, if all were entitled, and if only three were entitled, whether he would be made such allowance for those three? 4. Whether David Myers should be allowed for the improvements on the lands of the estate? 5. Whether David Myers should be allowed anything for his services? 6. Whether David Myers should be charged with annual rests; or in other words, with the interest on the funds he had received, compounded? 7. Whether the estate of Jacob Myers included the purchases of property made by David Myers since the death of the testator; or in other words, whether David Myers was bound to account for the profits of that estate, or only for the rents and liens? 8. Whether David Myers should be allowed for the raising and maintenance and taxes of the younger negroes until they attained the age of fourteen? 9. Whether David Myers should be allowed for advancements made to Dr. John Myers, William Myers and Mrs. Clendenin?

Preston and Harper, for the complainant.

McCord, for the complainant and Clendenin and wife.

O'Neill, W. Thompson and Gregg, for the executor.

THOMPSON, Chancellor, who heard the cause, decreed that all of the children of David Myers, born before the oldest child, John Myers, came of age, should be admitted, and ordered the share of John and William Myers to be paid over to them, they having arrived at majority. The defendant was not allowed for the maintenance of the children, but was allowed for the expenses of education, the chancellor saying; "This is a subject altogether within the discretion of the court, which will

be governed by circumstances; as if the father is in low and indigent circumstances, and the children are wealthy, there the court will allow for maintenance; but where the parent is in circumstances to allow it, the first law of nature makes it his duty to do so. The court is of opinion that the circumstances of the defendant were amply sufficient for that purpose, and therefore will not allow him any compensation for maintenance. But with respect to the expenses for their education the case is different. The testator having provided that the expenses of their education should come out of the profits of his estate, created a charge thereon, and the defendant must be allowed a discount out of the rents and hire *pro tanto*." The defendant was also allowed for necessary and permanent improvements made, and for the support and taxes paid on the young negroes until they reached fourteen years of age. The charge for personal services was rejected, and the chancellor ordered the accounting to be taken for the usual rate of interest on the rents and profits. It was also decreed that the testator died intestate as to the lot in Columbia, that the executor be allowed the advancements made to John and William, and to Mrs. Clendenin, and that the costs be paid out of the profits of the estate. The grandchildren all appealed.

By Court, NORR, J. At the death of Jacob Myers, the testator, David Myers, had three children, two sons and a daughter, now Mrs. Clendenin. He had several born afterwards. The question submitted to our consideration is, whether the children *in esse* at the time of the death of the testator are exclusively entitled to the property, or whether the after-born children are entitled to participate with them. I concur in opinion with the chancellor, that in the construction of wills the intention must govern, and that the intention must be collected from all parts of the will taken together, and not from particular parts or expressions. And I am willing, in this case, to adopt the other part of the proposition, that we must judge of the intention from the will itself, without regard to extraneous circumstances; though I am inclined to think that there may be cases where we may look beyond the will for the meaning of the testator.

I also agree with the chancellor that "the general rule upon this subject is, that where there is an indefinite period for distribution, the legacy vests at the death of the testator, and that none can take except those *in esse* at that time. But where there is a fixed period when the distribution is to take place,

as when the legatee shall arrive at the age of twenty-one, then all the children born before that time will come in for a distributive share, and such as are subsequently born will be excluded." But although I concur in the rule as thus laid down, and think that it contains the true principle upon which this case must be decided, I do not think that it is well illustrated by the case put by the chancellor. A., says the chancellor, gives his estate to B. and C., the children of D., to be divided between them when they arrive at the age of twenty-one years. A. dies, and D. has six other children born before B. and C. arrive at that age. A. and B. (I presume it was intended to say B. and C.) do not take the whole estate at the death of the testator; but the other six children of D., born before the distribution is to take place, will come in, and are entitled to a distributive share.

Now, with the utmost deference for the opinion of the chancellor, I should presume that B. and C. would take a vested legacy, although the time of payment was postponed until they arrived at the age of twenty-one, and that the after-born children would not be entitled to participate with them in the distribution. Where a legacy is given to children generally, without the specification of any in particular, all who are *in esse* at the time of distribution may come in, but where it is given to two or more individuals by name, the postponement of the time of payment, or of distribution, I should presume, would not affect their rights. After-born children, therefore, could have no claim on a legacy thus given, though born before the time of distribution. I am constrained, therefore, to withhold my assent from the case put by the chancellor, although I concur in the general principle which it seems intended to establish.

I also further agree, "that where legacies are given to a class of individuals, payable at a future period, as to the children of B., when the youngest shall attain twenty-one, or to be divided among them at the death of C., any child who can entitle himself under the description at the time of distributing the fund, may claim a part of it, as well the children living at the period of distribution, though not born till after the testator's death, as those born before, and living at the happening of the event." But then the period of distribution must be fixed, or it must depend upon some contingency, and not be left indefinite. For when the period of distribution is indefinite, those living at the death of the testator alone can take, according to the rule first laid down by the chancellor. And that distinction will be

found to run through all the cases. And in every case relied on by the chancellor it will be seen, that a time of distribution is expressly fixed by the testator, or some contingency, upon which the property is to go over, is expressly mentioned in the will, except the case of *Hughton v. Price*, said to be decided by Lord Redesdale, but as it does not appear from the decree where that case is to be found, nor the principle decided, I am unable to determine how far it is applicable to the case now under consideration.

In the case of *Ellison v. Airey*, the property was given over to the younger children of F. E., upon the death of C. B. before twenty-one, or marriage; it was held that all who came within the description at the time the contingency happened, should take: 1 Ves. sen. 111. In the case of *Bartlett v. Hollister*, 1 Bro. C. C. 530, the property was given to the testator's daughter H., for life, with remainder over to the children of his sister, upon the contingency of H.'s dying without issue. She did die without issue, and it was held that all the children of her sister, born before the termination of the life-estate should take. So in the case of *Congreve v. Congreve*, 1 Bro. C. C. 530, where property was given to all the children of A. at their respective ages of twenty-one, it was held that all were entitled who were born before that time, though after the death of the testator. So, where property is given to a parent, or to any other person, for life, with a limitation over, as in *Wild's case*, 6 Co. 17, and the case of *Stanley v. Baker*, Moore, 220, it vests in all the children *in esse* at the termination of the life-estate, or the happening of the contingency, because that is the time they are to take, and not before.

The same observations apply to the case of the *Attorney-general v. Crispin*, 1 Bro. C. C. 386; *Congreve v. Congreve*, Id. 530. For in both of those cases there is a fixed period when the legacies shall vest. The case under consideration, therefore, does not come within the principle of any of the cases relied on, because there is no time fixed for the distribution of the property, nor does it depend on any future contingency. The words of the will are, "I give and bequeath unto my dear and beloved grandchildren," without any qualification or limitation of time or circumstances. The legacy to his son, David Myers, is in the same words, and it will not be pretended that that did not vest at the death of the testator. The testator appoints his son, David Myers, "guardian of this valuable property," and unless he had considered it the property of his grandchildren it would

have been unnecessary to appoint a guardian to manage it for them. But he even goes further and "requests them to be well educated out of the profits arising from this estate now bequeathed unto them." It would seem, therefore, that from the very words of the will the grandchildren took an immediate and vested interest; for the possession of the guardian was the possession of his wards. And whatever latitude we may indulge in looking for the meaning or intention of a testator where it is not expressed, we are not authorized to presume an intention contrary to his express declarations.

It is admitted that there is no time fixed for the distribution to take place. But two circumstances are relied on; one to show that the testator had some future period in contemplation, and the other to show when that period was. The first relates to the negro girl given to Mrs. Dutilly during her life, and at her decease to go over with her increase, if she had any, in the same manner as the other property. It is said that, "It is obvious a considerable time must elapse before a negro girl of ten years could have increase." But the limitation over of the negro girl did not depend upon her having increase. She would have gone over at the death of Mrs. Dutilly if it had happened the day after the death of the testator. It is a circumstance which goes rather to show that the other property had already vested, because at her decease it is to "go in division with the other negroes, as part of the bequest made unto his dear and beloved grandchildren." The property given to Mrs. Dutilly could not be distributed until her death, but that can not affect the property given to the children.

The bequests are not all dependent on each other. The life estate of Mrs. Dutilly might terminate before either of the other legatees arrived at the age of twenty-one, or it might not happen for many years after. But let us suppose that the circumstances relied on by the chancellor go to show that the distribution was to take place at some future period, yet as the period is indefinite, the result will be the same according to the first rule laid down by the chancellor himself. The circumstance relied on to fix the period of distribution at twenty-one, is that sixteen years of age is the period at which a young man must enter college, and that it requires two years after the termination of his college life to acquire a profession. Now, there is no law requiring a young man to enter college at sixteen, nor prohibiting him from entering at an earlier period. Neither is there any requiring him to finish his professional studies at

twenty-one, nor even requiring him to study a profession at all. Both of these periods, therefore, are equally arbitrary and conjectural. I can not authorize any such conclusion. If the court may gratuitously adopt such a rule, the time of distribution can never be indefinite, because then if the testator fails to fix a period, the court may. I am of opinion, therefore, that according to the legal construction of the will, the children *in esse* at the testator's death are exclusively entitled to the property in question. And I think that all the authorities concur in that construction. Mr. Maddock lays down the rule, that "where a legacy is given to take effect at an indefinite period, it will be considered as vested at the death of the testator." And he adds: "The court will not conjecture against the general rule:" 2 Madd. Ch. 18.

In the case of *Ellison v. Airey*, 1 Ves. sen. 111, Lord Hardwicke says: "The court generally take it that there ought to be a legatee in being, and therefore will not construe a will to extend to persons not in being, unless the testator shows his intention to be such from his will." In the case of *Heathe v. Heathe*, 2 Atk. 121, the testator gave a legacy among all the children of his sister Catherine Heathe, share and share alike. Lord Hardwicke held that it went to the children then *in esse*, and excluded an after-born daughter. That is a much stronger case than the one now under consideration, because the legacy was given to all the children of the testator's sister. In the case of *Horsly v. Chaloner*, 2 Ves. sen. 84, the testator gave a legacy to the younger child of his son William, or if more than one, then to such younger children, etc., to be paid at their respective ages of twenty-one. The master of the rolls said: "The not keeping demands of this sort open, had very properly induced the court to confine it to such children as were in being at the death of the testator, when the number is known, and the portions they are entitled to, and the time when they are to recover it." He held, therefore, that it vested in those who were living at the testator's death, although the time of distribution was postponed until their respective ages of twenty-one.

In the case of *Hutcheon v. Mannington*, 1 Ves. jun. 366, an estate devised to be sold with all possible diligence or in a reasonable time was considered as sold from the testator's death, and that the legacy vested at that time. Lord Thurlow said there seemed to be some faint indications of an intention when the legacy should go over, and that it should not vest in the mean-

time, but that it was too uncertain to act upon. He agreed that the intention must prevail if it could be found out, but that he must have some rule to go by. In the case of *Stapleton v. Palmer et al.*, the rule is again recognized, "that a residue to be divided at an indefinite time vests at the death of the testator:" 4 Bro. C. C. 490; and so, also, when no time is mentioned: *Hutchinson v. Manningham*, in note. An exception to the rule is where there are no children in being at the time of the testator's death. There it necessarily embraces after-born children, because there are none others to take. But even in those cases, those only can take who are born before the time of distribution, even though the will expressly mentions those hereafter to be born: *Whitbread v. Lord St. John*, 10 Ves. 152; *Gilbert v. Boorman*, 11 Id. 238.

The case of *Singleton v. Gilbert*, 1 Cox, 68, is so exactly like this that it is difficult to discover a distinguishing feature between them. The testatrix gave the premises to all and every the child and children of her brother, T. G., and to the heirs of their bodies. T. G. had two children at the time of the death of the testator, and one born afterwards. The lord chancellor said: "This was an estate given directly, and, therefore, he could not consider the after-born child as entitled." It is indeed a stronger case than the one now under consideration, because the devises were subject to an annuity, and the annuitant was still living when the youngest child was born. See, also, *Crane v. Odell*, 1 Ball. & Beat. 459¹; *Freemantle v. Freemantle*, 1 Cox Cas. 248; and *Viner v. Francis*, 1 Ball. & Beat. 190². In the case of *Ringrose v. Braham*, 2 Cox Cas. 384³, the testator had given to the children of A. B. fifty pounds to every child he hath by his wife, to be paid them as they shall come of age. There were eleven children at the date of the will, thirteen at the testator's death, and three born afterwards. The thirteen children living at the testator's death, were held entitled to the legacies but not those afterwards born. And in the case of *Burke and wife v. Wilder*, 1 McC. Ch. 551, where the father had given the residue of his estate to his children, born or to be born, this court held that he died intestate as to an after-born child.

After such a host of authorities, and many more which might be adduced, all tending the same way, it would seem impossible that a doubt should remain on the subject, if we are to be governed by authority. And although the rule may operate unequally

1. *Crane v. Odell*, 1 B. & B. 459.

3. *Ringrose v. Braham*, 2 Cox, 284.

2. *Viner v. Francis*, 2 Cox, 190.

in some cases, it is one founded in experience, and in all probability, as a general rule, it is the best that can be adopted. It furnishes certain land-marks to direct our course, and prevents that litigation which would necessarily arise in every case without some fixed and determinate rule. It is also conformable with the well settled rule of law, that where a parent directs his property to be equally divided among his own children, a posthumous child not particularly provided for can not take. In the case of *Viner v. Francis*, 2 Cox, 384, the master of the rolls puts the very case: "Where a testator gives a fund to be divided among his own children, he shall be supposed to mean such children as are living at the time of his death." If so, why shall not the same principle apply in other cases? We have indeed an act of legislature now, which provides for a posthumous child; but until the passage of that act, the property vested in those only who were born at the death of the testator. The gift being made *per verba in præsenti* could only vest in those who were then *in esse*, and not in those who might never exist.

That part of the chancellor's decree, therefore, which directs the land to be equally divided among all the sons of David Myers, and the slaves among all the children, must be reversed. The lands must be equally divided between the two sons, John Myers and William Myers, and the slaves and other personal property must be equally divided between the three legatees, John and William Myers, and Mrs. Clendenin. With regard to the lot in Columbia, I concur in opinion with the chancellor; for although the testator uses the words, "all my landed estate," the subsequent specifications clearly restrict their operation to the particular lands therein described; and although the bequest of one shilling to David Myers is expressed to be as "full compensation, and as his full share of all (testator's) estate, both real and personal," yet as this lot is not otherwise devised, it must descend to his son as his only heir at law. And this construction is aided by the residuary clause, which relates to the personal estate only. The decree of the chancellor in this respect, is therefore affirmed.

The next point noticed in the chancellor's decree relates to the allowance claimed for the maintenance and education of the children. On that point, the court concur with the chancellor, and the decree in that respect is also affirmed.

The next question is, whether the defendant is entitled to improvements made on the land. On that point also I concur

in opinion with the chancellor. I think the defendant is entitled to remuneration for all such improvements as were necessary to preserve the property or render it permanently more beneficial or valuable to the *cestui que trust*. But he is not entitled to remuneration for money uselessly expended in ideal or unsuccessful experiments, nor for any improvements beyond the actual amount of money expended, or the value of the labor employed.

Another question of no little importance is, whether the property accumulated by Daniel Myers, shall be considered as belonging to the trust estate, or whether he shall be liable for the rents and profits of the land and the hire or labor of the slaves. There can be no doubt but that David Myers, having been appointed the guardian of his children, and having the management of their estate, must be considered as a trustee. And there is no rule of equity better settled, than that a trustee shall not be permitted to employ the trust fund for his own benefit. All purchases, therefore, made with the funds of the trust estate will be considered for the benefit of the *cestui que trust*. That principle is exemplified in numerous cases where it has been held that executors, attorneys, and trustees shall not purchase at their own sales, nor of their *cestuis que trust*, clients, etc. All persons acting in such representative capacity are considered in equity as trustees, and are governed by the same rules, and it is no answer on the part of the defendant, that he has so mixed up the two funds together, that he can not distinguish one from the other. A person may sometimes, by mixing the estate of another with his own, subject himself to a loss of both; for it is his own fault that they have not been kept separate. But it does not appear to me that this is a case which will subject the defendant to the loss of all the property he has in possession, merely because he can not show what part of it has been purchased with the proceeds of the trust estate. His refusing to account, however, furnishes a very good reason why the court should adopt the most rigid rule of calculation which the law affords in behalf of the *cestui que trust* as a substitute for such omission. Compound interest has sometimes been allowed on that ground and directed to be calculated on short rests: *State of Connecticut v. Jackson*, 2 Johns. Ch. 14¹; *Schieffelin v. Stewart et al.*, 2 Id. 620²; *Raphael v. Boehm*, 11 Ves. 92; 13 Id. 407, 590.

In this case, if the property which has been acquired by the

1. 1 Johns. Ch. 13.

2. 1 Johns. Ch. 620; 7 Am. Dec. 507.

proceeds of the trust estate, can not be ascertained, perhaps the method adopted by the chancellor is best and probably the only method which can be resorted to to effect the object. I can not, however, concur in the opinion expressed by the chancellor, that compound interest ought not in any case, nor under any circumstances, to be allowed. There are many instances where compound interest has been allowed, as will appear by the cases already referred to, and without which the greatest injustice would be done. That question was settled in the state as early as the year 1796, in the case of *Bowles v. Drayton*, 1 Desau. 489 [1 Am. Dec. 689]; a case very similar in principle to the one now under consideration. The testator gave three thousand pounds to his daughter, to be paid on her marriage, or when she should attain the age of twenty-one, and that the lawful interest of the said sum should be annually paid and applied for her use, behoof, maintenance and education. The interest being more than was necessary for those purposes, a balance remained for several years in the hands of the executors. The question was whether they should pay interest on the annual balances of interest so remaining unappropriated. Chancellor Rutledge, who delivered the opinion of the court, said: "That it was a matter resting in the discretion of the court, and that the interest would be allowed, or not, according to circumstances." And the decree was that "the master should make a statement of the account, allowing interest on the yearly balance of interest," etc.

The only difference between the two cases is, that in one the annual interest on the legacy is directed to be appropriated to the use of the *cestuis que trust* or legatee, and in the other, the annual income of the estate is appropriated to the same use. And in every case since, where the court has had occasion to lay down any general rule on the subject, the same principle has been recognized, and particularly in the case of *Wright v. Wright*, decided at our last sitting in this place: 2 McC. Ch. 185. For although compound interest was not allowed in that case, the principle laid down was distinctly noticed and recognized. In this case the defendant has received the rents and profits of the lands, and the profits arising from the labor of the negroes. These constituted an annual fund in his hands for the benefit of the *cestuis que trust*, and it is incumbent on him to show that he has employed it for that purpose, or he must pay interest upon it.

He will be allowed a deduction for improvements, the education of the children, and the maintenance, taxes, etc., of the

young negroes. But I do not think that the allowance for the support of the young negroes ought to be carried up to the age of fourteen. A slave, I think, must certainly be able to maintain himself by his labor before he arrives at that age. That, however, will be a matter of reference to the commissioner to ascertain. After making an allowance for the just claims of the defendant according to the principles above laid down, to be deducted annually as they arose, the defendant must pay interest on the balance remaining in his hands. In taking an account, however, of the income of the estate, a distinction must be made between the rents and profits of the land, and the labor of the negroes. The two sons are exclusively entitled to the rents and profits of the land, and the hire of the negroes must be divided among the three claimants. With regard to the property given to Mrs. Clendenin, soon after her marriage, whether it was intended as an advancement of his daughter in marriage, or a payment of the legacy, is a question which has not been tried. The court, therefore, can express no opinion upon it. That part of the case must be referred back to the court of equity for a hearing.

It is, therefore, ordered, decreed and adjudged that the land in question be divided equally between John Myers and William Myers; and that the negroes, together with the increase of the females, be equally divided and distributed between the said John Myers, William Myers, and Mrs. Clendenin. It is also further ordered that it be referred to the commissioners to inquire whether there is any and what property in the hands of David Myers, the defendant, which has been purchased with the funds of the trust estate, and to take an account of the rents and profits of the said land, and the hire and labor of the negroes; and that after making all proper deductions for the improvements on the land, the education of the children, and the expenses of raising and maintaining the young negroes, according to the principles hereinbefore laid down, and all other necessary expenditures and disbursements incurred for the benefit of the devisees and legatees, the amount due for the rents and profits of the land, with the interest on the annual balance thereof, be paid over in the manner directed for the division of the land; and that the balance due for the labor of the negroes, be calculated in the same manner, be paid over and distributed in the manner as directed with regard to the negroes.

And with regard to the property received by Mr. Clendenin, that the case be referred back to the court of equity to hear and

determine whether the same was given to him in advancement of his wife in marriage, or in payment of the legacy due her under the will of her grandfather. And that the decree be reformed so as to correspond in all respects with the principles hereinbefore laid down, and that the costs be reserved until a final hearing of the cause.

Decree modified.

WHEN PARENT MAY SUPPORT CHILD OUT OF ITS ESTATE.—As a general rule, a father is bound to support his children during minority if he be of ability to do so, whether they have property or not; and no allowance will be made him for that purpose out of their property while his own means are adequate for their support: Schouler's Dom. Rel. 322; *Cruger v. Heyward*, 2 Desau. 94; *Dupont v. Johnson*, 1 Bailey's Eq. 279; *Matter of Kane*, 2 Barb. Ch. 375; *Addison v. Bowie*, 2 Bland, 606; *Harland's case*, 5 Rawle, 323; *Walker v. Crowder*, 2 Ired. Eq. 478; *Haglar v. McCombs*, 66 N. C. 351; *Evans v. Pearce*, 15 Gratt. 513; *Griffith v. Bird*, 22 Id. 73; *Tanner v. Skinner*, 11 Bush, 120; *Buckley v. Howard*, 35 Tex. 565. This obligation resting upon the father does not extend to the mother: 2 Kent's Com., sec. 191; *Whipple v. Dow*, 2 Mass. 415; *Dawes v. Howard*, 4 Id. 97; *Mowbry v. Mowbry*, 64 Ill. 383, where Justice Walker expresses the opinion of the court that the separate property of a widowed mother is not liable for the support of her infant children where they have means, or a provision has been made for their maintenance; although her separate estate might be charged in equity were the children without means and unable to earn a support, and no provision had been made therefor. Schouler, in Dom. Rel. 325, contends nevertheless that the mother after the death of the father should be bound to support her children if able to do so; holding that such a rule is more conformable to justice, and is in keeping with the tendency to give the mother a more equal share in the parental rights.

But if the father is unable to maintain his child in a manner suitable to his position and prospects in life, if the father be indigent and the child possessed of property, the court of chancery may upon the petition of the father direct the estate of the infant to be applied to its maintenance and education whenever, under all the circumstances, it appears to be proper: *Griffith v. Bird*, 22 Gratt. 73. *Beasley v. Watson*, 41 Ala. 234; *Welch v. Burris*, 29 Iowa, 186; *Sparhawk v. Buell*, 9 Vt. 41; *McKnight v. Walsh*, 23 N. J. E. (8 C. E. G.) 136; *Smith v. Geortner*, 40 How. Pr. 185; and the cases above cited. In determining whether the father is able to maintain his child, within the meaning of this rule, attention should be paid to the amount of the fortunes of the infant, as well as the situation, ability and circumstances of the father: *Matter of Kane*, 2 Barb. Ch. 375. That the latter should be entirely without means, is not demanded by the courts before they will call upon the child to contribute. The tendency of the judicial mind is to consider the facts of each case with liberality, with the view so to apportion the expense of living, that it may be met by those most able to bear it: Schouler's Dom. Rel. 323; *Jervis v. Silk*, Cooper's Eq. 52; *Greenwell v. Greenwell*, 5 Ves. 194; *Hoste v. Pratt*, 3 Id. 730; *Ex parte Penleaze*, 1 Bro. C. C. 387, n.

A concise statement of the law is thus made in *Trimble v. Dodd*, 2 Tenn. Ch. 500, 502: "The old rule undoubtedly was that the parent should support his children, and could not, as guardian, claim an allowance for their

board and clothing: *Hughes v. Hughes*, 1 Bro. C. C. 387. But this rule has long since been relaxed; Lord Thurlow himself, who decided *Hughes v. Hughes*, having changed his opinion on the point, as we learn from Sir John Mitford, solicitor-general, as *amicus curiæ* in *Hoste v. Pratt*, 3 Vea. 733. If the father be without the necessary means to maintain his children according to their future expectations; or, if he have the means, but the income of the children is larger than his own, the modern usage is to make an allowance to the parent for maintenance: *Roach v. Garvan*, 1 Vea. 160; *Jervis v. Silk*, Coop. Eq. 52; *Simon v. Barber*, Taml. 22; *Matter of Bostwick*, 4 Johns. Ch. 104; *Matter of Burke*, 4 Sandf. Ch. 617; *McKnight v. Walsh*, 8 C. E. Green, 136; S. C., 9 Id. 498; *Myers v. Myers*, 2 McCord's Ch. 255. The old rule, too, was to make no allowance for past maintenance: *Hill v. Chapman*, 2 Bro. C. C. 231; *Andrews v. Parlington*, 3 Id. 60; S. C., 2 Cox, 223. But this rule has also been relaxed: *Collis v. Blackburn*, 9 Vea. 471; *Maberly v. Torton*, 14 Id. 500; *Wilks v. Rogers*, 6 Johns. Ch. 566."

The question has been presented whether sufficient allowance should be made out of the infant's estate, to keep up an establishment by the father, suitable to the prospects of the child. In the *Matter of Burke*, 4 Sandf. Ch. 617, the chancellor allowed the father two thousand five hundred dollars per annum, although the master reported that one thousand five hundred dollars would be sufficient to support the infant daughters at home. The maintaining them at home was more expensive than would have been the cost of their board, etc., at a first class seminary; but the court not only allowed for their living with their father, but awarded the increased amount, to enable him to keep up such an establishment as a home for them, as was deemed suitable to their rank and expectations. Chancellor Zabriskie, criticising this decision, says, in *McKnight v. Walsh*, 23 N. J. E. (8 C. E. G.) 136, 144, that it "stands by itself in New York," and that "it goes far beyond any decision, doctrine or dicta in any of the English cases. I am not willing to adopt a principle by which the fortune of infant daughters, derived from their mother, shall be appropriated to maintain their father, his second wife, and her family, in a manner that his own means will not warrant, because it is suitable to the condition and prospects of the infants. They might, perhaps, be authorized to pay their proportionate share of the expense of such establishment; but the principle should go no further." The facts before the chancellor in the case from 23 N. J. Eq. 136, presented an attempt to credit the estate of a father guardian with expenditures necessary for him to support and maintain an establishment suitable for a wealthy child, as a member of his family. The court refused to allow the credit, and said that the idea that a child having property should be obliged to support his father, mother, brothers and family, in a style suitable to his estate and condition, sprung up in England from their law of primogeniture, and the established custom among the nobility and gentry, by which the heir at law, upon whom the family seat devolves, as well in infancy as when of age, is, by their customs, bound to keep up the family mansion as a home for his sisters and younger brothers, and is allowed out of his estate sufficient for that purpose.

Courts not only make provision for the future support of the infant out of his estate, but will allow for past expenditures. As is said in *Alston v. Alston*, 34 Ala. 27: "If the father is unable to maintain his infant child, having an independent estate, the chancery court will, upon application by the father, make an allowance to him for the maintenance of such infant: *Watts v. Steele*, 19 Ala. 656; *Osborn v. Van Horn*, 2 Fla. 360; *Matter of Burke*, 4 Sandf. Ch. 617. The court of chancery does not confine itself to the making of an al-

lowance for a prospective maintenance, but will, in a proper case, allow a reimbursement to the father for the past maintenance of the infant: *Stewart v. Lewis*, 16 Ala. 734; *Montgomery v. Givhan*, 24 Id. 568, 588; *Osborn v. Van Horn*, *supra*; *Patton v. Patton*, 3 B. Mon. 160; *Heysham v. Heysham*, 1 Cox, 178; *Hughes v. Hughes*, 1 Bro. C. C. 387; *Andrews v. Partington*, 3 Id. 60; *Greenwell v. Greenwell*, 3 Ves. 194; *Reeves v. Brymer*, 6 Id. 425; *Sisson v. Shaw*, 9 Id. 285; *Maberly v. Turton*, 14 Id. 499; *Ex Parte Bond*, 2 Myl. & K. 439; *Clay v. Pennington*, 8 Simons, 359. Reason suggests, as the criterion for determining when an allowance for past maintenance should be made, the inquiry, whether a chancery court would have authorized it in advance. If, then, a father was unable to make the contribution to the maintenance of his infant child, at the time when it was made, the chancery court will reimburse him." The court then say that the question of the parent guardian's right to credit for maintenance and education of the child, was reduced to this: "Was he able to maintain and educate him as he did?" To determine this question, it is necessary to inquire what is meant by ability to maintain the infant.

"In *Watts v. Steele*, 19 Ala. 658, this court said that the making an allowance to the father does not depend upon his insolvency, but upon his inability to support and educate the child suitable to his fortune; that the father's ability was to be estimated comparatively; that his income, the size of the family dependent on him for support, his physical inability from disease, etc., to exert himself, should be taken into the estimate; and that if in view of the circumstances it should appear to be reasonable to make an allowance, and for the benefit of an infant, the court should order it. Upon that authority, as well as those cited below, we conclude that in determining the question of the father's ability to maintain and educate his son, it is proper to consider the amount of his estate, his income, the number of other children dependent upon him, his expenses, the loss of time and money, and the expenses growing out of proper efforts to restore or alleviate the affliction [referring to a disease from which his wife suffered], and the amount of his son's fortune: *Macpherson on Infants*, 222, 223; 41 Law Library, 15, 152; *Hoste v. Pratt*, 3 Ves. 730; *Allen v. Coster*, 1 Beavan, 204; *Matter of Burke*, 4 Sandf. Ch. 617; 2 Lea. Cas. Eq. (2 part) 171; *In re Stables*, 13 Eng. Law and Eq. 61; *Osborn v. Van Horn*, 2 Fla. 360; *Myers v. Myers*, 2 McCord, Ch. 255; *Dupont v. Johnson*, 1 Bai. Eq. 281." So, also, *Beasley v. Watson*, 41 Ala. 234. It must be understood, however, that past maintenance creates no debt, and that the burden of proof is upon the parent to establish, on a special case made, such a state of facts as entitles him to an allowance out of the income of his children, and the proof should be clear, where the allowance is at all extravagant: *Trimble v. Dodd*, 2 Tenn. Ch. 500; *Ex parte Bond*, 2 Myl. & K. 439; *Presley v. Davis*, 7 Rich. Eq. 105; *Smith v. Geortner*, 40 How. Pr. 185; *Matter of Kane*, 2 Barb. Ch. 375; *Welch v. Burris*, 29 Iowa, 186. In this last citation the plaintiff, the mother of infant children, petitioned for an allowance to her for the support of children since her husband's death, out of the funds obtained on a pension by the defendant, the guardian of the infants. On demurrer that the pension money was exempt from liability for debts, that the court had no power to decree for a past allowance, but only for the future, and that the plaintiff was bound to support the children. The court were of opinion that the moneys having come from the bounty of the government, did not render it any the less liable for the support of the children; but they thought that a proper showing had not been made to warrant their making an order of allowance for the past support of the minors. "Such an order," says Cole, C. J., "would only be made under special circumstances,

and to justify it would require a stronger case than to procure an order for future allowance, or, at least, all the facts requisite for a future allowance and a satisfactory showing why application for such allowance was not made in advance."

Whether a personal representative would be heard to prefer a claim for past maintenance where the father had not thought proper to set up such a demand, was questioned in *Dupont v. Johnson*, 1 Bailey's Eq. 279. But in *Evans v. Pearce*, 15 Gratt. 513, the estate of a father who appeared to be of ability to maintain his children, having property of their own, and who had maintained them without having made any petition for an allowance out of their income, was not allowed a credit for such maintenance. And where neither the father in his life-time, nor his personal representative upon his decease, made any application for an allowance for support of infant children, and it appearing that at his decease the father was possessed of a large estate, which, however, became insolvent by subsequent events, a general creditor was not permitted to come in and seek to subject to his claim the sum which he contended should be allowed the estate for the support of the children: *Griffith v. Bird*, 22 Gratt. 73.

Though, as a general rule, the court will confine its allowance to the annual income from the infant's estate, yet an exception is made where the estate is small and the income is insufficient for the child's support: Story's Eq. Jur., sec. 1355. The rule is founded in prudence and a just regard for the rights of infants, to prevent extravagance and incautious action on the part of their guardians, but is not inflexible: *Osborne v. Van Horn*, 2 Fla. 260; *Matter of Bostwick*, 4 Johns. Ch. 100; *Newport v. Cook*, 2 Ashm. 332.

SCOREVEN v. BOSTICK.

[2 McCORD'S CH., 410.]

RESORT IN EQUITY TO THE PERSONAL ASSETS of a debtor will only be permitted where the creditor has obtained judgment at law, and the execution issued thereunder cannot be enforced without the aid of equity.

THE WANT OF ADMINISTRATION is a good objection at law or in equity to a suit against the estate.

AN EXECUTOR DE SON TORT liable as such in equity is also liable at law.

PERSONS INTERMEDDLING WITH A DECEDENT'S ESTATE are liable to the executor or administrators only.

EQUITY JURISDICTION, WHEN ENTERTAINED.—It is not sufficient to show that the subject-matter is within the jurisdiction of a court of equity, to authorize the retaining a bill; the complainant must show his right to bring the defendant into that court.

BILL to set aside a marriage settlement made by one Thomas Singleton, filed by a certain judgment-creditor of Singleton. It appeared that the judgment was obtained on Singleton's administration bond, on the ground of a *devastavit*. Singleton had died insolvent, and no administration had been taken out on his estate, but his widow, now Mrs. Bostick, had been in possession of certain slaves conveyed to her under the marriage

settlement, which was sought to be set aside by this proceeding.

The defendants objected that an action at law should have been brought against Singleton's personal representatives, and a demand established before equity would entertain such a bill.

Chancellor Desaussure dismissed the bill; whence this appeal was taken.

Martin, for the appellants.

Petigru, contra.

By Court, NORR, J. This case is now submitted to this court on the grounds which were urged in the court below. And although the bill has been dismissed by the chancellor, and this is a motion to reverse that decision, I shall begin with the arguments relied on by the defendants in opposition to that motion.

The principal ground relied on (to put in the words of the decree) is that a suit at law should first have been brought to establish the demand. On that subject, the rule, as laid down by Chancellor Kent, in the case of *Brinkerhoff v. Brown*, 4 Johns. Ch. 676, as the settled rule in chancery, is that if a person wants relief touching the personal assets of his debtor, he must show that he has taken out execution at law, and pursued it to every available extent against the property, before he can resort to equity for relief. It is not sufficient that he has established his demand. It is not sufficient even that he has obtained judgment and issued execution, but must show that it can not be enforced without the aid of the court of equity, before that court will afford relief, and the principle appears to be well sustained by the cases therein referred to. The court of equity can not know by anticipation that an effort to obtain the debt at law will be ineffectual. And if such an allegation is to furnish a ground of equity jurisdiction, every creditor may go at once into the court of equity for relief. It is contended that the want of administration gives jurisdiction to the court of equity. We have had occasion more than once to investigate that question.

In the case of *Farley v. Farley*, in Columbia, 1 McC. Ch. 506, and the case of *Gregorie v. Forrester*¹, during this sitting, the subject was fully examined. We then came to the conclusion, and for reasons perfectly satisfactory to my mind, that the want of administration was as good a ground of objection to enter-

1. *Gregory v. Forrester*, 1 McC. Ch. 318.

taining a suit in equity as at law. If there is no executor, and no one will administer, the creditor may take the administration on himself. The ground upon which a bill may be maintained against a person in possession of the property is because, by possessing himself of the property, he becomes liable as executor in his own wrong; but the same intermeddling will make him equally liable in that character at law. If the defendants are not liable as executors, then they are not liable at all except to the executor or administrator. In the case of *Humphreys v. Humphreys*, 3 P. Wms. 349, Lord Chancellor Talbot ruled that even the next of kin, who was entitled to the administration, should not be permitted to prosecute his bill until he administered. And in the case of *Elders v. Vauters*, 4 Desau. 155, the former court of appeals in equity held that a purchaser who had been ten years in possession under a sale from the next of kin, and where it was admitted that there were no debts, should not retain the property against the administrator afterwards appointed.

It is contended that the complainant is seeking for a discovery of the issue of the female slaves and an account of their labor. But it will be recollected that this is not a bill for the specific property. The question is, whether the defendants are liable as executors, and for that purpose it is not necessary to inquire into the number or names of the slaves, nor the value of their labor. The judgment at law does indeed show the amount of the *devastavit* committed by Singleton, but it does not show that the complainants have paid that much for him. And if it did it would not follow that his estate was still indebted to them to that amount. And if both those facts were admitted it would remain to be proved that their rights might not be enforced at law. It is not sufficient to show that the subject-matter of the bill is within the equity jurisdiction; it must appear that the complainant stands in relation to the defendants as will entitle him to the aid of that court for relief.

Suppose, upon a return of the subpoena in this case, the defendants had come into court and disclaimed any right to the property, and offered to deliver it up to any person who was entitled to receive it. The complainants could not have received it, for they have no right to the property nor do they pretend to any. They have no execution against Singleton, and, therefore, could not have levied on it. They would then have been precisely in the situation they were in before the bill was filed, unless we are prepared to say that every creditor, when there is no

administration, may go at once into the court of equity to recover his debt against any person in possession of the property. Without going into the merits of the case, therefore, I am of opinion that the bill was properly dismissed. But I am disposed to concur in opinion with the chancellor that the complainants were barred by the statute of limitations, though I have not looked so minutely into the circumstances of the case as to enable me to come to a definite opinion on that question. It appears to me that it is no answer to the plea, that there was no administration, when the only ground on which the bill can be sustained is that the defendants are executors. If the complainants had administered, it might then have become a question whether they would have been barred by the wrongful possession of the defendants. On that question, however, I shall express no opinion at present, as I think on the other ground the motion must be refused.

Decree affirmed.

Relied upon in *Brown v. McDonald*, 1 Hill's Eq. 301.

LOWNDES v. CHISOLM.

[2 McCORD'S CH., 455.]

SURETIES, ON DISCHARGING THE OBLIGATION, are entitled to the securities given by their principal.

IGNORANCE OF LAW may sometimes be relieved against in equity. As in the case of a purchaser at an execution sale who thought he was buying a fee-simple, where only an equity of redemption could pass; the purchaser would be considered a mortgagee in possession and accountable for the rents and profits.

A SALE ON CREDIT may be ordered by a court of equity.

BILL in equity. Hasell mortgaged to Chisolm one half of a certain wharf to secure the purchase-price, for which Hasell had given seven bonds. Two of the bonds had sureties, Lowndes and I'On, the complainants, and these two, Chisolm assigned to the State Bank. The other half of the wharf Hasell sold to Motte. All the bonds, other than those assigned to the bank, were put in suit; and an undivided moiety of the wharf sold under execution and bought by Chisolm for fifteen thousand dollars. There was no foreclosure of the mortgage. Chisolm filed a petition for partition of the wharf, and the commissioners reporting that the property could not be divided, recommended a sale, which was accordingly ordered. Chisolm bought for fifty-five thousand dollars.

Lowndes and I'On were sued as sureties by the State Bank, and having satisfied the judgment recovered, filed the present bill against Chisolm, insisting that they were subrogated to all the rights of the bank, and that, as the equity of redemption had not been foreclosed, the premises in Chisolm's hands were still liable to them as mortgagees.

At the time of the sale, under the execution, Hasell was out of the state and insolvent; and the sheriff who sold the undivided moiety offered the fee-simple, and not the mere equity of redemption.

Chancellor Desaussure decreed that the complainants had a right to stand in the place of the bank, and to receive a proportionate part of the mortgaged premises of Hasell, and ordered Chisolm to account for the rents and profits of the wharf. He ordered him also, as standing in the place of Hasell, to pay to the complainants their principal, interest and costs, or the mortgaged premises to be sold, nothing but the equity of redemption having been previously sold by the sheriff, and the proceeds applied to satisfy the complainants; the balance to be paid to Chisolm.

The defendant appealed.

Petigru and King, for the appellants. Relief may be granted where a person has acted under an erroneous construction of the law: Bacon's Law Tracts, 280; Pothier 387 *et passim*; 2 Bro. C. C. 250; *Onions v. Tyrer*, 1 P. Wms. 345; 1 Ves. & B. 168; 16 Ves. 72, 84; 1 Binn. 27, 37; *Parrot v. Parrot*, 14 East, 423; 2 Desau. 529; 7 Johns. Ch. 394; 2 Pothier, 444.

Ford and Toomer, contra.

By Court, COLCOCK, J. The principal ground now made does not seem to have been much considered below. I am, in the first place, constrained to think that the case has been unnecessarily incumbered with the fact that the bonds to which the complainants were sureties had been assigned to the bank, and with a great deal of argument founded on that fact, when it can have no possible bearing on the rights of the complainants. Their equitable claim to the aid of this court arises out of the original contract made by their principal with the defendant, and their subsequent payment of the two bonds to which they were sureties. To whom they were paid was not a matter which could either increase or diminish their equitable claim, nor could the fact of the bonds having been assigned create any other right than that which they had before.

The first, and the important question in the case is, whether the defendant is bound by the purchase at the sale made by virtue of the execution. It is said that he could acquire no more than the equity of redemption under that sale; but yet that he must be held accountable for the fifteen thousand dollars, which he bid for the property, under a supposition that he was buying the fee-simple. And this position is maintained by attempting to show that a court of equity never relieves against a mistake at law, though it will always relieve against a mistake of fact. Now, without attempting to investigate the propriety of this distinction, as being generally well founded, it is obvious that cases may arise in which it becomes the duty of a court of equity to relieve against the consequences of a mistake at law as well as against those of a mistake of fact. The law is sometimes doubtful. A sudden and important alteration of the well-established doctrine on any particular subject by a crude, undigested act of the legislature, oftentimes produces such uncertainty as to render it extremely difficult to know what the law is, until the proper tribunals shall have given the act some exposition. And this certainly was the situation of the country in relation to the act of 1791, until the decision *Ex parte the City Sheriff*.

The act of 1791 declared that the mortgagor was the owner of the land, notwithstanding the conveyance to the mortgagee, and says the land is only to be considered as a pledge. Now, under that state of things, it was supposed that the interest of the mortgagor might as well be disposed of by a sale under execution as by the usual mode of foreclosing the mortgage in equity, or by the mode prescribed by the act, which applied only to some particular cases; and it is admitted that in this case the defendant thought he was selling the fee. And it has been further stated, and not contradicted, that he was confirmed in such opinion by that of one of the most distinguished members of the bar. Be that as it may, there was, to say the least of it, some confusion created by the act of 1791 and the subsequent act of 1797; and although the conduct of the defendant has been complained of as hard and rigorous, I confess I can discover nothing in it which should preclude him from the benefit of that relief which has been afforded in many cases of a similar kind. His debtor failed to comply with his contract and he sought the remedy which the law gave him, and it is evident meant to use it in legal form. His debtor had left the state. There is no evidence of any overtures of accommodation.

What then was the rational conclusion? I think no other could be drawn from the circumstances, than that the property

was abandoned by the debtor. Had there been a regular foreclosure, either at law or in equity, there would have been no ground left for this application. But it is well established that relief is given in cases where the mistake has been clearly one of law. And the authorities relied on put the matter beyond all doubt, if indeed it could be doubted at this day. The only case on which I shall make any particular comment, is that of *Hunt v. Rousmanier*, 8 Wheat. 215, in which the point is expressly decided in the opinion delivered by Chief Justice Marshall, in which he refers to some of the English cases which have been relied on in the argument, and says: "Although we do not find the naked principle that relief may be granted on account of ignorance at law asserted in the books, we find no case in which a plain and acknowledged mistake in law is beyond the reach of equity," and surely no case can prove more clearly that such mistake is not beyond the reach of law than the case of *Landsdown v. Landsdown*, Mosely, 346. The ignorance in that case was that the complainant was entitled as eldest son to the estate; and yet relief was afforded in so plain a mistake. It being determined then, that the defendant is not to be held liable on the purchase made under the execution, it follows of course that the original debtor, William S. Hasell, is still entitled to the equity of redemption, and the defendant is to be considered as a mortgagee in possession, and as such liable to account for the rents and profits.

But as no claim is set up by the mortgagor, it becomes a question whether the complainants are entitled to any and what relief; and on this part of the case it is certainly not necessary, after the decision in the case of *Hampton v. Levy*, 1 McC. Ch. 107, that much should be said. The equitable claim of a surety to all the securities given by the principal to his creditors, is now too well established and too familiar to need any illustration. The sureties in this case had a right to rely, and no doubt did rely, on the mortgage as operating as a counter-security in their favor, to the amount of whatever the land would bring at public sale. I say public sale; for as all contracts are supposed to be made in reference to the law of the land, they had a right to calculate that, if their principal failed to pay the debt, the mortgage would be foreclosed according to law; and in such case, it was well known that the property would be sold at public sale and on a reasonable credit; for notwithstanding all that has been said against the exercise of this power by the court of equity of "selling on credit," it seems to be now too well established to admit of any doubt; and there-

fore, both defendants and complainants may be considered as contracting with reference to this power of the court—a power, which it is not pretended the court can exercise to an arbitrary extent any more than any other discretionary power, of which there are an infinite number vested in all the higher courts, both of law and equity. The property not having been disposed of then according to law, if on an account taken it should appear that the debt is not yet paid, the mortgage is to be considered as foreclosed, and the property must be sold on a credit. On this part of the case we concur with the chancellor; but we do not conceive that the defendant is in any event liable to refund the money paid by the sureties. If the rents and profits of the wharf and the proceeds of the sale cover the bonds to which they are sureties, it is well; but if not, they must cover the loss, for their equity extends no further. Whether the property, when brought to the hammer, should sell for its value or for a less sum, was a risk which they, the sureties, took upon themselves.

It is therefore ordered and decreed that the sale made by the sheriff of Charleston district, of a moiety of the wharf mentioned in the pleadings, be set aside, and that the said moiety of William S. Hasell in the wharf be sold by the master of this court, giving one month's notice, and on a credit of nine months, with personal security if required by the master, in the manner directed by the forty-fourth rule of the court. And it is further ordered that the master do take an account of the rents and profits of the wharf, and that the defendant, George Chisolm be charged with one moiety of the rents and profits as a mortgagee in possession. All just allowances to be made to the defendant for necessary expenses of repairs and management and improvement, after which the proceeds to be applied in the first place to the interest due, to be calculated according to the contract, and to his, defendant's, cost at law and in equity, and in the next place to the satisfaction of the principal due to the defendant on the bonds of William S. Hasell, in his hands, of which an account is also to be taken, and that the balance which may be still due to defendants, if any, be paid in the first place, out of the moneys out of the sale of the property, and the surplus, if any there be, to be then applied to the repayment to the complainant of the sums paid by them, and the interest which has since accrued.

Decree modified.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

NASH v. HARRINGTON.

[2 AIKENS, 9.]

NOTE INDORSED WHEN LONG OVERDUE will be treated as if indorsed on the day of payment for the purpose of demand and notice.

LAW MERCHANT ADOPTED IN VERMONT.—The law merchant, being a part of the common law of England, has been adopted, as such, in this state by statute, so far as applicable to our circumstances and not repugnant to our constitution and laws.

INDORSER OF OVERDUE NOTE is entitled to reasonable demand and notice. **WHAT IS REASONABLE DEMAND AND NOTICE** is purely a question of law where the facts are found.

WHERE ALL THE PARTIES LIVE IN THE SAME TOWN, in the case of a note indorsed when long overdue, demand should be made upon the maker in a day or two at farthest after the indorsement, and, if not paid, notice should be given to the indorser on the day of demand.

DEMAND SEVEN DAYS AFTER THE INDORSEMENT, in such a case, and notice of non-payment given on the first or second day afterwards, are unreasonable, and will discharge the indorser.

REPUTED OR ACTUAL INSOLVENCY OF THE MAKER does not dispense with the necessity of demand and notice to charge the indorser.

ASSUMPSIT against the indorser of a promissory note. Plea, the general issue. It appeared at the trial that the note sued on was made by one Burnham to Cumber, and indorsed by the latter to the defendant, who indorsed it to the plaintiff, December 1, 1824, eight or ten months after it was due, together with another note made by Burnham, payable to the defendant. It also appeared that the plaintiff and defendant resided in the village of Burlington, and Burnham at Onion River Falls, two miles distant; that at the time of the indorsement Burnham was confined to the jail limits, and for several months before and ever

since had been reputed insolvent, and that at the time of receiving the notes the plaintiff expressed some apprehensions of him. The facts relating to demand and notice are stated in the opinion. The court, upon the evidence, decided that the plaintiff was not entitled to recover, and, by the judge's direction, the jury returned a verdict for the defendant. The plaintiff excepted to the decision.

John N. Pomroy and Charles Adams, for the plaintiff.

William Brayton and J. C. Thompson, for the defendant.

By Court, HUTCHINSON, J. This case came here a year ago on a writ of error, upon which the judgment of the county court was reversed, and the cause remanded for another trial. That decision was made in view of facts offered to be proved on that trial appearing in the bill of exceptions attached to the record, and which were rejected by the court. The court considered that if all the evidence offered on that trial had been given to the jury, the law arising thereon would have entitled the plaintiff to a verdict. It was stated in that case, that the plaintiff offered to prove, that when he had notice of the demand upon Burnham and his refusal to pay, he, the defendant, promised to make the payment to the plaintiff. But the case presented by these exceptions, arising from the facts actually proved on the last trial, is a very different one in many respects, particularly in defining the distance of the maker of the note from the parties, the time of the demand, and also in relation to the subsequent promise of the defendant to pay the note. The evidence detailed in the case certified up, and which is now before the court, has but a faint bearing upon the fact of the subsequent promise offered to be proved, and does not amount to proof that any such promise was made.

The defendant's expression, that if the demand were sued, he must pay his note, and Cumber his, might have some application to the other note, of which the court know nothing, but seems not to refer to this.

There is nothing in this, therefore, tending to take the case out of the rules of law applicable to demand and notice.

As to the fact that this was a sale and indorsement of a note long overdue, the court are of opinion, that it can not, under the circumstances, make any difference in the case, and are disposed to treat it as a note indorsed on the day of payment. We are driven, then, to the question, will the court here adopt the

rules of the law merchant, touching the necessity of demand upon the maker, and notice back to the indorser, in order to charge him, as the same are known in England? The court see no reason why they should not, where the circumstances of the parties do not render them inapplicable. Where the law in England requires notice to be given back on the same day, if the facilities of demand and notice back are the same here, there is no reason why the rule should not be the same. The law merchant is a part of the common law of England, and as such is adopted by statute here, so far as it is applicable to our local situation and circumstances, and is not repugnant to the constitution, or any act of the legislature of this state. And so far the courts of this state are bound to recognize it.

The indorser may treat the demand as out of his power and out of his care till he has notice of non-payment. He may know of the maker's purchasing a horse or other property; he can not attach it, for he can make no writ upon it while in the hands of the indorsee. Without this rule, every case must rest upon its own peculiar facts, furnishing a fruitful source of litigation, and of uncertainty in the result. The question recurs, therefore, has there been reasonable notice? When the facts are found, this becomes purely a question of law. Here the facts have been found and are presented in the case. And what are they? They are, that the note was indorsed on the first day of December, 1824; that on the eighth day of the same month payment was demanded of the maker, and refused; that on the first or second evening after the demand and refusal, notice thereof was given to the indorser, and that during all this period these parties resided near each other in the same village; and the maker only about two miles from them. Is this reasonable notice? The court say it is not. Under these circumstances, the demand should have been made in a day or two at farthest; and notice must have been given on the same day of demand. We consider that the plaintiff by keeping the note that length of time without demand, made it his own, and discharged the indorser from his liability.

As to the insolvency of the maker, it is not stated that he was insolvent, but that he was imprisoned, and was reputed to be insolvent, and to have no attachable property. But if it were alleged in positive terms, it is unimportant; for it is well settled by the authorities that notice must be given back to charge the indorser, notwithstanding the insolvency of the maker. Though the maker be poor, yet something may be

found by the indorser. The result of the whole is, that judgment must be entered for the defendant on the verdict.

Judgment for the defendant.

INDORSEMENT AFTER MATURITY.—That one who indorses a negotiable instrument after maturity is entitled to have demand made upon the payor within a reasonable time, and notice of non-payment given to himself, see *Ecfert v. Des Coudres*, 12 Am. Dec. 609, and note thereto, and *Hill v. Martin*, 13 Id. 372.

SEASONABLENESS OF DEMAND AND NOTICE is a question of law where the facts are found: *Haddock v. Murray*, 8 Am. Dec. 43.

KING v. HARRINGTON.

[2 ALKENS, 33.]

RECORDING OF AN ASSIGNMENT OF A MORTGAGE need not be alleged in a foreclosure suit by the assignee, since it is merely a matter of evidence.

RECORDING OF SUCH ASSIGNMENT IS NOT IMPORTANT as between the assignee and mortgagor, where there is no pretense of payment to the assignor, without notice.

BONA FIDE SALE AND DELIVERY OF A NOTE to the assignee of a mortgage securing the same, passes the title therein without a written assignment of such note.

ASSIGNMENT OF MORTGAGEE'S INTEREST in the mortgaged premises carries with it the right to receive payment of the notes secured by the mortgage.

POSSESSION OF THE NOTES in such case by the assignee is necessary only to rebut the presumption of payment, and not to convey the right.

ASSIGNOR CAN NOT RECEIVE PAYMENT of notes secured by mortgage after an assignment of the mortgage without becoming liable to the assignee for money had and received.

WHERE ONE OF TWO MORTGAGEES HAS ASSIGNED his interest to a third person, and the other mortgagee has deceased after receiving his proportion of the mortgage debt, the assignee may sue alone.

REPRESENTATIVES OF THE DECEASED MORTGAGEE ARE TRUSTEES, in such a case, holding half the right in trust for the assignee, of the survivor, and may be compelled to execute the trust in his favor.

DESCRIBING THE DECEASED MORTGAGEE as A. B., "late of, etc., deceased," is a sufficient averment of his death to enable the assignee of the survivor to sue alone.

BILL by the assignee of a surviving mortgagee for the foreclosure of the equity of redemption in the mortgaged premises. Demurrer by William C. Harrington, one of the defendants. The grounds of demurrer and the material allegations of the bill are sufficiently stated in the opinion.

Charles Adams, for the demurrer.

J. C. Thompson, *contra*.

By Court, HUTCHINSON, Chancellor. The object of this bill is to foreclose the equity of redemption of certain premises, mortgaged by said Josiah King, to William C. Harrington, now deceased, and one Thaddeus Tuttle. The orator claims to be assignee of said Tuttle of his half of the premises, and sets forth in his bill, that the mortgagor paid to said William C. Harrington, in his life-time, his half of the mortgage money; and the said Isaac R. Harrington is made a defendant in the bill, because he has since received a mortgage deed from King, the mortgagor, of the same premises. King, the mortgagor, has neglected to appear, and the bill has been taken as confessed, with regard to him. The other defendant, Harrington, has demurred to the whole bill, for want of parties and for want of equity.

It is objected that the orator, has not shown himself to have a sufficient conveyance of Tuttle's half of the premises. On reference to the bill, we find it alleged, that before any payment of any part of said mortgage money, to wit, on, etc., the said Tuttle for the consideration of one half of the amount of said notes, contained in said mortgage, paid to his full satisfaction, by the orator did give, grant, convey and assign over to the orator, his heirs and assigns, his, the said Tuttle's, moiety of said mortgaged premises, with the appurtenances, free and clear of all incumbrances, by an instrument, signed, sealed, and acknowledged by the said Thaddeus, in due form of law, and here ready to be produced in court. The recital of this part of the bill sufficiently answers the objection. It shows a full conveyance to the orator of all Tuttle's interest in the premises, which is a right to hold the premises till the money secured upon the mortgage is paid.

It is alleged, however, that the bill contains no averment that the assignment was recorded. That is not necessary to be averred. It is not essential to the right, but only regards the question of notice. And it is sufficient, if it appear in proof. But it does not appear, that the fact of recording is important, as between these parties, while there is no pretense of payment to any person. If Harrington disclosed in his answer a payment to Tuttle, without notice of the assignment, that would present a very different consideration.

It is further objected, that the notes do not appear to have

been assigned to the orator. The bill alleges that, after the above assignment of Tuttle to the orator, and after William C. Harrington had received from the mortgagor the payment of one half of said notes, so that all his interest in the same was discharged, the said William C. Harrington delivered the same notes to the orator. If this objection means anything, it is, that there should be an assignment or conveyance of the notes written upon them, or some writing, describing them as the object of the assignment. The court consider this unnecessary, provided there be a *bona fide* sale and delivery of the notes to him to whom the interest of the mortgage in the land is assigned. That appears to have been done in this case. Moreover, the assignment by the mortgagee of his mortgage interest, does, of itself, convey the right to receive the payment on the notes described in the mortgage. The possession of the notes is necessary to rebut the presumption of payment which would result from their absence, but is not essential to convey the right. Tuttle could not have received the pay on these notes after he had assigned the mortgage to the orator, and before the orator received the notes from William C. Harrington, without making himself liable to the orator for the amount, as for money received to his use. Then surely neither the mortgagor nor his assignee can complain that the assignment is not shown in the bill to be sufficiently complete.

It is further objected that all this does not entitle the orator to sue alone. The court consider that describing William C. Harrington as late of Burlington, deceased, is a sufficient averment of his death to present the orator as assignee of the survivor of the payees. But that is not all; he shows himself alone to have an equitable interest in the notes and mortgage. He shows himself entitled to receive all the money now due upon the same. It is, therefore, proper that he should have a decree that the mortgage be paid to him, or the equity of redemption be foreclosed. It is true the executors of William C. Harrington hold one half the right of the mortgagees, but that is only a trust estate for the benefit of the orator, and, should they intermeddle with the estate, a bill would compel them to execute their trust by quitting their legal estate to the orator.

The demurrer is, therefore, overruled, and the defendant, Harrington, must answer over.

PRENTISS, J., absent, by reason of indisposition.

ASSIGNMENT OF MORTGAGE.—It is the settled doctrine in Maine, that as a mortgagee holds the legal estate in the mortgaged premises, he can not assign

his interest except by an instrument under seal; but it seems that the debt secured thereby may be transferred by delivery merely without writing: *Voss v. Handy*, 11 Am. Dec. 101, and note. In *Wilson v. Troup*, 14 Id. 458, it was decided that an assignment or conveyance of the mortgagee's interest in the land, unless accompanied by an assignment of the debt, was a nullity.

JONES v. COOPER.

[2 ALKINS, 54.]

CLAIM AGAINST AN INSOLVENT ESTATE of a decedent can not be allowed by commissioners under the statute, unless it be a present debt or duty, or a demand *in presenti*, payable at all events *in futuro*; if its future payment rests upon a contingency, and it is uncertain whether any demand will accrue, it can not be allowed.

SAME PRINCIPLE PREVAILS in the proof of claims under commissions of bankruptcy.

UNCERTAINTY OF SUM CLAIMED is no obstacle to the allowance of the claim, if there is a legal remedy or a demand *in presenti*, though payable *in futuro*.

EVERY CLAIM ARISING OUT OF GAIN or acquisition of the estate, through another's labor or property, or founded on a contract imposing a duty on the deceased obligor, which his representative is bound to perform, and upon which he is liable, may be proved against the estate.

CONTRACT FOR THE PAYMENT OF A STATED SUM, or the delivery of certain articles, or the performance of specific acts or services, which is to be performed at all events, though at a subsequent time, may be the subject of valuation; but not where its performance rests upon a contingency which may never happen.

CONDITIONAL BOND, before condition broken, is not a present debt or demand provable against an intestate's estate.

BOND GIVEN TO INDEMNIFY A SURETY on guardian's bond, and to save him harmless therefrom, can not be allowed against the estate of the deceased obligor, without its being shown how such surety has been damnified.

CONDITION OF SUCH BOND OF INDEMNITY is not broken until the surety has actually paid the money, or has at least been sued on the original bond, and such surety is not damnified by the mere failure of the guardian to pay over money of his ward in his hands.

BREACH OF ANY SUBSTANTIVE PART OF THE CONDITION of a bond works a forfeiture of the bond at law.

BOND CONDITIONED TO ACCOUNT "WHEN THERETO REQUESTED," constitutes the request a part of the condition, and in assigning a breach, such request must be averred, and the time and place specified.

AVERTMENT THAT THE INTESTATE DID NOT ACCOUNT "when thereto required," is insufficient, where the request is parcel of the condition.

FORFEITURE OF INTESTATE'S BOND AFTER COMMISSION CLOSED.—Where a surety on a deceased guardian's bond, who has taken a bond of indemnity, is damnified after the commission upon the estate of the decedent is closed, the personal representative is still liable if any of the estate remains in his hands undistributed, after paying all the debts allowed under the commission.

APPEAL from a report of commissioners on the estate of James Stevens, jun., deceased, disallowing a claim presented by Edward Jones, the appellant. The said claim was founded on a bond of indemnity for one thousand dollars, executed by the deceased to the appellant to indemnify and save harmless the said appellant from a certain bond given by the deceased to the probate judge as guardian for one Nancy Brewster, a minor, for the faithful execution of his trust, which bond was signed by the appellant as surety. The appellant, on praying this appeal, filed with the probate court a declaration of his claim against the administrator under the statute, alleging that Stevens, the deceased, in his life-time, executed on a certain day to the appellant his certain writing obligatory (meaning the said indemnity bond), acknowledging himself to be holden and firmly bound to the appellant in the sum of one thousand dollars, to be paid to the appellant when the said Stevens should be thereto afterwards requested, but which the said Stevens in his life-time, and his administrator since, though both often requested, had wholly refused and neglected to pay to the appellants damage in the sum of one hundred dollars. The administrator defended, and craved oyer of the condition of the said writing obligatory which was read to him. The condition of said obligation, after reciting the appointment of Stevens as guardian, the execution of the guardian's bond, and the fact that the appellant had signed the same as surety, was as follows: "Now if the above bounden James Stevens, jun., shall well and faithfully account with the judge of probate for all such money or property as has already, or may hereafter, come into his hands belonging to the said Nancy Brewster, together with the lawful interest thereon, at any time when he may be thereto requested by the said judge of probate, or his successors in office, and shall well and truly indemnify and save harmless the said Edward Jones, his heirs and assigns, from all cost or expense etc., by reason of being surety as aforesaid, then this obligation to be void, otherwise to be and remain in full force and effect in law." The administrator therefore pleaded that the appellant ought not to have or maintain his action against the said administrator, because no account had ever been required of him, and because the appellant had not been in any way damaged. There was a second plea in bar and demurrer thereto. To the first plea above recited the appellant filed a replication to the effect that he ought not to be precluded from maintaining his action by reason of any matter set forth in the plea, be-

cause the said Stevens had received large sums of money, to wit, the sum of five hundred dollars belonging to his ward which he had not accounted for with the judge of probate, "when by said judge of probate thereto required and demanded, but thereof made default," and there remained in his hands at his decease, not accounted for by him, the sum of three hundred dollars, whereby the appellant became and was liable upon the said bond for the said sum not accounted for, and therefore the said indemnity bond to the appellant was forfeited. Demurrer to the plea and joinder therein.

Charles Adams, for the appellant.

William Brayton, for the appellee.

By Court, PRENTISS, J. This is an appeal from the determination of commissioners appointed to receive and allow claims against an estate represented insolvent; and the general question arising in the case is, whether the pleadings show a demand in favor of the appellant, which he is entitled to an allowance of, against the estate.

By the act regulating the settlement of testate and intestate estates (Comp. Stat., c. 44, secs. 89, 92), the commissioners on an insolvent estate are to receive, adjust, and allow all claims and demands against such estate, whether due and payable at the time, or payable at a future day. Without entering at large into the inquiry, what demands may or may not be proved against an insolvent estate under these provisions of the statute, it is sufficient for the purposes of this case to say, that where there is no subsisting debt or duty, or where the claim, if payable or to be satisfied at a future day, rests in contingency, and it is uncertain whether or not any demand will accrue, it can not be allowed. There must be a present debt or duty, or a demand *in præsentia*, payable, or to be satisfied at all events *in futuro*. In the administration of assets in England, although an obligation for the payment of money absolutely at a day certain, though at a future time, may be pleaded to an action brought by a simple contract creditor, yet a contingent security, as a bond to save harmless, if the contingency has not taken place, can not be pleaded: 11 Vin. Abr. 305; *Goldsmith v. Sydnor*, Cro. Car. 363; *Harrison's case*, 5 Co. 28; *Buckland v. Brock*, Cro. Eliz. 315. A similar principle prevails in the proof of claims under commission of bankruptcy. It is settled, that where a bond is conditional, and not forfeited, and it rests in contingency whether or not there will be a demand against

the bankrupt, it can not be proved under the commission: *Alsop v. Price*, Doug. 160; *Hancock v. Entwisle*, 3 T. R. 435; *Dobson v. Lockhart*, 5 T. R. 133. In cases of insolvent estates, where there is no present duty, and it depends on some future event whether or not a demand will arise, it is obvious that no claim exists which can be proved before the commissioners. The mere uncertainty of the sum claimed, provided there is a legal remedy, or a demand *in præsentia*, although to be satisfied in *futuro*, will not deprive the creditor of relief against the estate under the commission. As the commissioners are authorized to receive and adjust all claims and demands against the estate, every claim, however uncertain its amount, in case the remedy survives against the representative of the deceased, may be proved before the commissioners; for as the creditor can look only to the estate of the deceased, if he is not allowed to come in with the other creditors under the commission, and the estate is in fact insolvent, he is without remedy. Of this nature is every claim, which arises out of gain or acquisition of the estate by the labor or property of another, or which is founded on a contract which contains a duty vested in the obligee, and which the representative of the deceased is bound to perform, and on which he is liable as such. Thus, if A. is bound to build a house for B. before such a time, and A. dies before the time, his executors are bound to perform this: 5 Vin. Abr. 241; and I do not see why the claim ought not to be allowed, although the time of performance has not arrived, and the damages are uncertain. Rent payable in future, as there may be an eviction and it may never become due, is placed on a different footing. But then the claim must be one which is capable of being liquidated and valued. A contract for the payment of a certain stated sum, or the delivery of certain articles of property, or for the performance of specific acts or services, if to be performed at all events, though at a subsequent time, may be the subject of valuation; but where the performance of the contract depends on a contingency which may never happen, it is evident that it can not be valued. As the bond declared upon in this case is not for the payment of a sum certain, or the performance of an act at all events, so as to raise a present debt or duty, but is conditional, depending on a contingency, it follows that there must at least be a breach of the condition and a consequent forfeiture of the bond to give the appellant a demand against the estate of the intestate.

The question then is, whether the bond declared upon is, or

is not, forfeited; and this question must be decided on the pleadings. As no objection is made to the sufficiency of the plea in bar, the only question arising upon the first set of pleadings respects the sufficiency of the appellant's replication. If the bond is to be considered a mere bond of indemnity, it is manifest that no sufficient breach is assigned, and the replication is clearly insufficient. In *Griffith v. Harrison*, 1 Salk. 197, it is laid down that where a counter-bond or covenant is given to save harmless from a penal bond before condition broken, there, if the penal sum be not paid at the day, and so the condition not preserved, the party to be saved harmless does by this become liable to the penalty, and so is damnified, and the counter-bond forfeited; but if the counter-bond be given after the condition of the obligation is broken, or to save harmless from a single bill without a penalty, there the counter-bond can not be sued without a special damnification. As it does not appear from the pleadings that the original bond in which the appellant joined as surety for the intestate was a penal bond; or, if we are to intend that it was that there has been a breach of the condition of it, the appellant, according to the case just cited, should have set forth specially in his replication how he was damnified, and nothing short of paying the money on the original bond, or at least being sued upon it, would constitute a breach: *Taylor v. Wilson*, Camp. 525; *Paul v. Jones*, 1 T. R. 599; 1 Saund. 117, n. 1. The mere fact alleged that the sum of three hundred dollars belonging to the ward remained in the hands of the intestate, and not paid over at the time of his death, is no damage; for the appellant may notwithstanding never be sued or charged.

But it is insisted on the part of the appellant that the bond declared upon is conditional, not only to indemnify and save him harmless from the original bond, but also that the intestate should well and faithfully account with the judge of probate for all money or property which had then, or might thereafter, come into his hands belonging to the ward, when thereunto required by the judge of probate; and that if this part of the condition of the bond is broken, the bond is forfeited. There is no doubt of the principle that if any substantive part of the condition of a bond is broken, the bond is forfeited at law. The case of *Hodgson v. Bell*, 7 T. R. 97, is an authority to this effect. There the counter-bond taken by the surety was conditioned for the payment and discharge of the original bonds according to the true intent and meaning thereof, and also to indemnify and

save harmless the surety from all damage, etc.; and it was held that as one of the original bonds had not been paid at the time it became due, a part of the condition of the counter-bond was broken, and the bond was thereby forfeited at law. But whether from a just construction of the condition of the bond in this case it is anything more in truth, when taken together, than a condition to indemnify and save harmless, may perhaps admit of a question. Assuming, however, the construction given to it by the counsel for the appellant, we are then to inquire whether the replication sets forth any breach of that part of the condition which is relied upon. The replication alleges that the intestate did not during his life account with the judge of probate for the goods and chattels of the ward in his hands when by the judge of probate thereto required and demanded, but thereof made default, and at the time of his decease there remained in his hands three hundred dollars not accounted for. This, in substance, is no more than saying that the intestate had not performed the condition of the bond; and such general statement is clearly insufficient. When the condition is to do a thing when thereto requested, there the request is part of the condition, and must be averred with all necessary circumstances of time and place: *Fitzhugh v. Dennington*, 6 Mod. 227; *Devenly v. Wilbore*, Cro. Eliz. 85; *Birks v. Trippet*, 1 Saund. 33, n. 2; *Bach v. Owen*, 5 T. R. 409.

The request to account was a traversable fact, and should have been specially alleged, by a direct and positive averment. Instead of that, the averment is merely that the intestate did not account when thereto required and demanded, which, independent of its generality, is not a direct and positive, but at the most a mere argumentative allegation. It has been argued that the death of the intestate dispensed with the necessity of any request, and that thereupon the bond became immediately forfeited. But if by that event the condition to account became impossible to be performed, the consequence would seem to be, as the condition contains no duty vested in the appellant, and none could accrue to him until a breach of the condition, that the bond, so far as it respects that part of the condition, is saved. If, on the other hand, the duty of rendering an account survived, and the condition remained to be performed, notwithstanding the death of the intestate, it devolved, of course, on his personal representative; and the request being parcel of the condition, there could be no breach of the condi-

tion, and consequently no duty accruing to the appellant until request.

As the replication shows no breach of the condition to account, nor that the appellant has been in any way damnified, there has been no forfeiture of the bond, and consequently he has no cause of action, or anything like a *debitum in præsenti*. There is no debt due him, or any subsisting demand which can be allowed him. He has paid nothing, nor been put to any damage, and it is not certain that he ever will be compelled to pay anything. Whether he will be or not is an event depending on contingencies which may never happen. If, however, he should be made chargeable, and a debt should hereafter arise upon the bond, the personal representative of the intestate, notwithstanding the commission is closed, would still be liable, if the estate is not in fact insolvent, and assets remain after paying the debts allowed under the commission, unless the surplus estate has been distributed among the heirs by a decree of the court of probate. In such case, he will be discharged, and the heirs will be liable to the extent of the estate, real and personal, decreed to them, in proportion to their respective shares: Comp. Stat. ch. 44, sec. 80. As we are all of opinion that the replication to the first plea in bar shows no breach of the condition of the bond, it must be adjudged insufficient. As this decides the case, and the appellee is consequently entitled to judgment, it becomes unnecessary to notice the second plea in bar, or give any opinion upon its merits.

Judgment for the appellee.

CHAPPEL v. MARVIN.

[2 AIKENS, 79.]

DELIVERY OF CHATTELS.—Where a purchaser of chattels takes possession of part of them, and the key to the shop containing the residue is left with a third person for him by the vendor pursuant to an understanding between them, the property thereby passes so as to enable such purchaser to maintain trespass against a subsequent purchaser from the vendor who takes actual possession of the goods in the shop by borrowing the key from the person with whom it is left.

TRESPASS for taking a quantity of plank and other timber, the property of the plaintiff. Plea, the general issue. It appeared at the trial that Chappel, the plaintiff, purchased a quantity of plank and timber from one Redfield, and paid him therefor.

The plaintiff took away a part of the timber which was in a certain bark-house when Redfield told him that the rest of it was in his, Redfield's, shop, and that he would leave the key for him with one Ganson. Redfield left the key with Ganson for the plaintiff accordingly. There was evidence tending to show that Marvin, the defendant, subsequently purchased the same plank and timber from Redfield, but it did not appear what, if any, consideration he paid for the same. Marvin applied to Ganson for the key, who delivered it to him, supposing that he called on behalf of the plaintiff, and Marvin afterwards took away the said plank and timber, which was the trespass complained of. The judge instructed the jury that upon this evidence, if they believed it all to be true, the plaintiff was entitled to a verdict. Verdict for the plaintiff accordingly. Motion for a new trial on exceptions to the instructions.

Stephen S. Brown, for the plaintiff.

A. Burt and B. Turner, for the defendant.

By Court, HUTCHINSON, J., (after stating the case): The only questions litigated in this case arise upon the charge of the court to the jury. And the principal question there arising is, whether the property in question was sufficiently delivered to vest the title in the plaintiff, as against Marvin. For the charge was, that if the jury believed all the testimony on both sides, they ought to find for the plaintiff. There was no testimony that Marvin ever took possession, or had any control of the property, till the taking of which the plaintiff complains as a trespass; and that control he obtained by the help of the key, which was left by Redfield for the plaintiff; and it was delivered him by Ganson, who then supposed he applied in behalf of the plaintiff. This being all the possession of the defendant, the court have no doubt but that the purchase by the plaintiff, and his going and taking what was in the bark-house, and having the promise that the key of the shop should be left with Ganson, to enable him to get at the property in the shop, and the key being left accordingly, before Marvin obtained any possession whatever, as testified by the witnesses, was a sufficient purchase by, and delivery to, the plaintiff, to entitle him to recover of the defendant. It was suggested by the counsel for the defendant that the court assumed the province of the jury in saying that it did not appear that Marvin paid any consideration for the timber. This was obviously an allusion to there being no testimony of any actual payment by him

of any consideration. As the case undertakes to recite all the testimony, and as there is no mention of any such payment, the allusion was warranted by it.

The defendant takes nothing by his motion, and judgment must be entered upon the verdict with additional damages and costs.

FLETCHER v. HOWARD.

[2 AIKENS, 115.]

PROPERTY IN PERSONAL CHATTELS MAY PASS by a bargain and sale for sufficient consideration without delivery as between the parties, but delivery is necessary as to other persons.

WHEN THE SAME CHATTEL IS SOLD TO TWO PURCHASERS by conveyances equally valid, he who first lawfully acquires possession must prevail.

CONSIDERATION OF SALE, SUFFICIENCY OF.—The liability of the purchaser of a chattel as surety on the vendor's note, or the discharge of a debt due from the vendor to the purchaser, is a sufficient consideration for the sale of such chattel.

TEMPORARY DELIVERY OF POSSESSION of a chattel to a purchaser who, after retaining it for a few hours, redelivers it or permits it to return to the possession of the vendor does not pass the property as against a second purchaser from the vendor who subsequently takes possession.

CONTINUED CHANGE OF POSSESSION is necessary to transfer the title as against a subsequent purchaser for value.

DELIVERY OF POSSESSION MUST ACCOMPANY A PLEDGE of a personal chattel to render it valid.

IF THE PAWNEE IMMEDIATELY REDELIVERS the thing pledged to the pawnor the special property therein created by the bailment is determined.

GENERAL OWNER HAVING POSSESSION of a pledge may lawfully dispose of it to any one, and the pawnee can not recover it or maintain trespass for it.

EXCEPTIONS.—A party has a right to require the opinion of the court upon any point of law pertinent to the issue, and a refusal to give it will be error to which an exception may be taken.

ERROR to the county court to reverse a judgment obtained in an action of trespass for taking a certain hog. The action was originally brought before a justice of the peace and taken to the county court on appeal. It was proved at the trial that in June, 1823, Howard, the plaintiff below, became surety on a note for one Peters, and that the latter, to indemnify him, pledged to him the hog in question, of which the plaintiff was to take possession when he pleased. The plaintiff left the hog with Peters till August 2, 1823, when he took it and drove it home. The hog returned to Peters's possession by noon of the same day, and remained there until August 8, when it was taken possession of by the defendant under a bill of sale ex-

ecuted to him by Peters on August 1, 1823, in consideration of a certain debt due from Peters to the defendant, which was then released and discharged. The defendant asked the court to instruct the jury that if they found that the hog returned from the plaintiff's after he drove it home as above stated, without straying, or that having returned by straying it remained in Peters's possession with the plaintiff's consent, knowledge and permission until the defendant took possession, the transaction between Peters and the plaintiff was fraudulent, and that the defendant had a right to take possession and was entitled to a verdict. But the court refused so to charge or to give any instructions on that point, but left the jury to decide the law as well as the facts; to which refusal the defendant excepted. Verdict and judgment for the plaintiff; whereupon the defendant sued out this writ of error. The assignment of errors embraced several other exceptions besides the one above stated; but as the supreme court did not consider them, it is deemed unnecessary to insert them or the points of evidence to which they referred.

A. G. Whittemore and J. C. Thompson, for the plaintiff in error.

Hector Adams, Asa Aldis, and James Davis, for the defendant in error.

By Court, PRENTISS, J. There is no doubt that property in personal chattels may pass by a bargain and sale for a sufficient consideration, without delivery, as between the parties to the sale; but then, as against every one but the vendor, there must be a delivery of the possession. When therefore the same chattel is sold to two different persons, by conveyances equally valid, he who first lawfully acquires the possession, will hold it against the other: *Lanfear v. Sumner*, 17 Mass. 110 [9 Am. Dec. 119]. The liability of the plaintiff below to pay the small note signed by him as surety for Peters, the former owner of the hog, was undoubtedly a sufficient consideration for the transfer to him; and the discharge of the debt due from Peters to the defendant, was an equally valid consideration for the subsequent assignment to the defendant.

Both transfers, therefore, being equally valid, as it respects the consideration on which they were made, and good against Peters, the rights of the parties at the trial, as against each other, must have depended altogether on the question of possession. The evidence given was, that the transfer to the plaintiff

iff was made in June, but no delivery or possession was taken by him until the second of August following. He then took the hog into his keeping for a few hours; but the same day it went back into the possession of Peters, and there continued until the eighth of August, when the defendant took possession of it under the bill of sale executed to him, dated the first of August. Although the possession taken by the plaintiff on the second of August was before the defendant acquired possession, yet the possession so taken, if the transfer to the plaintiff had been an absolute sale, would not avail him, if he permitted the hog immediately to go back and remain in the possession of Peters. Such a temporary possession of the plaintiff would be as no possession against the defendant, who was a creditor of Peters, and took the assignment of the hog in satisfaction of his debt. The principle is, that the continuance of the vendor in possession of a personal chattel, gives him a false credit, and enables him to impose upon the world, and deceive and defraud those who deal with him.

The transfer to the plaintiff, therefore, to be valid against the defendant, must have been accompanied and followed with possession, and this would be so, whether the transfer was a sale or a mere pledge. But, considered as a mere pledge, as the bill of exceptions states it to have been, there is another view of the case. It is essential to every pledge of a personal chattel, that it should be accompanied by delivery of possession; or it will not be valid; and in case of delivery, the general property remains in the former owner, and only a special property passes to the pawnee: Cro. Jac. 245; Yelv. 178; 16 Vin. Abr. 263; Powell on Mortg. 3. If, therefore, the pawnee takes a delivery of the thing pledged, and yet immediately redelivers it to the owner, or, which is equivalent thereto, permits it to go back into his possession, the special property, created by the bailment, is determined and gone. The general owner, having the possession, may lawfully dispose of it to any one, and the pawnee has no such right or property in the thing as will enable him to maintain trespass, or indeed any action to recover it. In every view of the case, the defendant had a right, on the evidence given, to call upon the court to instruct the jury that if the plaintiff permitted the hog to go back into the possession of Peters, or it was permitted to remain there with his knowledge and consent, the defendant, under the assignment to him, acquired the legal property. A bill of exceptions is not confined, as the plaintiff's counsel argued that it was, to some opinion or decis-

ion expressed by the court in the course of the trial, or some positive misdirection to the jury. A party has a right to require the opinion of the court upon any point of law which is pertinent to the issue, and the refusal of the court to give such opinion is cause for exception, and a ground of error: *Smith v. Carrington*, 4 Cranch, 62. On this ground, without considering the other points discussed in the argument, the judgment must be reversed.

Judgment reversed.

THAT DELIVERY OF CHATTELS IS NECESSARY to pass the property therein to a purchaser, see *Ford v. Sproule*, 12 Am. Dec. 439; and *Peabody v. Carrol*, 13 Id. 305.

SELLICK v. MUNSON.

[2 ADKINS, 150.]

CREDITOR CAN NOT APPLY PAYMENTS to items in his account which he could not recover in an independent action, so as to create a balance in his favor on the remaining items.

RENT OF PROPERTY CONVEYED AS SECURITY to indemnify the grantee against liability as surety for the grantor, constitutes a part of the security and can not be recovered by the grantor until the liability is discharged.

SURETY'S LIEN ON SUCH RENT IS NOT EXTINGUISHED, but rather confirmed, by an agreement that moneys in his hands due the plaintiff are to be applied on the debts for which he is surety.

ASSUMPSIT for goods sold and delivered and for money had and received. Plea, the general issue. It appeared at the trial that the plaintiff had an account against the defendant for goods sold, etc., and that there were also charged in the account certain rents due on a store in Potsdam, New York. Sundry payments had been made by the defendant for the plaintiff, which were enough to extinguish the account with the exception of the charges for rent. It further appeared that the defendant was surety for the plaintiff for the payment of certain debts, some of which were still unpaid, and that the plaintiff had conveyed to the defendant a certain property in Hopkinton, by an absolute deed, to secure him against liability as such surety, which property had been exchanged for the store in Potsdam. It also appeared that in October, 1821, there was a balance of about two hundred and four dollars due the plaintiff, from the defendant on account, which it was agreed between the parties that the defendant should apply on the debts for which he was surety for the plaintiff. The judge charged the jury that

although the rents as such could not be recovered in this form of action, yet as it appeared that the defendant had paid money for the plaintiff to a considerable amount without a specific application to any particular account, the plaintiff had a right to apply such payment to the rents, and recover for other charges to the amount of the balance stated to be due; to which instruction the defendant duly excepted. Verdict for the plaintiff. Motion that the verdict be set aside and a new trial granted, on the ground of misdirection.

J. C. Bradley and S. S. Phelps, for the motion.

R. B. Bates, D. Chipman and George Chipman, contra.

By Court, PRENTISS, J. It is very obvious that if the plaintiff, in a proper form of action, could not recover the rents arising from the store in Potsdam, he was not entitled to recover in this case; for exclusive of the rents, there appears to have been no balance due him. This right to recover, therefore, must have depended on his right to demand the rents. If he could not call the rents out of the defendant's hands by a suit, he could not apply the moneys paid and advanced to him by the defendant, in satisfaction of the rents, and in this way extinguish the defendant's credit for advances, and create a balance in his favor, which he might demand and recover. He could not thus do indirectly, in effect, what he could not be permitted to do directly. The objection does not go to the form of action merely, but to the plaintiff's right to demand the rents. The store, from the occupation of which the rents accrued, having been conveyed to the defendant, as his security for having become surety for the plaintiff, the plaintiff could no more recover the rents issuing out of the estate so held and possessed by the defendant, than he could recover the estate itself, until he had discharged the defendant from his liability as surety. The rents grew out of, and were incident to the estate, and constituted a part of the defendant's security, as much as the estate itself. The agreement between the parties that the balance in the defendant's hands in October, 1821, should be by him applied in payment of the debts for which he had become surety, could not have the effect to discharge his lien upon the balance, as far as it respected the rents; but was rather in affirmance of it. By the agreement, the balance was not to be withdrawn from the defendant by the plaintiff, but was to remain in the defendant's hands, for his security, and to be by him applied to reduce the debts for which he was holden, and thus relieve himself from so much of his liability.

The plaintiff, therefore, could not appropriate the balance, so far as concerned the rents at least, to a different purpose, and thus deprive the defendant of a part of his security, which he might do if he could call the balance out of the defendant's hands. The plaintiff might have discharged the defendant from his liability, and then perhaps have recovered the balance which the rents would create in his favor.

But it appeared that the debts were still outstanding and unpaid, and until they were discharged the plaintiff had no right of action. If the moneys advanced by the defendant had been paid on the debts for which he was surety, the payments might have been applied to the rents, but this does not appear. Indeed, the case is quite imperfect in many respects; but from what we can collect from it we think the direction to the jury was wrong, and that the verdict must be set aside and a new trial granted.

New trial granted.

BARRETT v. BUXTON.

[2 AIKENS, 167.]

NOTE EXECUTED WHILE THE MAKER IS INTOXICATED so as to be deprived of the exercise of his understanding is voidable by him, although his intoxication was voluntary and not procured by the circumvention of the other party.

ASSUMPSIT on a promissory note. Verdict for the plaintiff, and motion for a new trial on grounds which sufficiently appear from the opinion.

Chauncey Langdon and Charles K. Williams, for the plaintiff.

William Page and R. B. Bates, for the defendant.

By Court, PRENTISS, J. This is an action upon a promissory note executed by the defendant to the plaintiff for the sum of one thousand dollars, being the difference agreed to be paid the plaintiff on a contract for the exchange of lands. The agreement of exchange was in writing, and the plaintiff afterwards tendered to the defendant a deed in performance of his part of the agreement, which the defendant refused. The defendant offered evidence to prove that at the time of executing the note and agreement he was intoxicated, and thereby incapable of judging of the nature and consequences of the bargain. The court refused to admit the evidence without proof that the intoxication was procured by the plaintiff. The question is,

whether the evidence was admissible as a defense to the action, or in other words, whether the defendant could be allowed to set up his intoxication to avoid the contract.

This question has been already substantially decided by the court on the present circuit; but the importance of the question and the magnitude of the demand in this case have led us to give it further consideration. According to *Beverley's case*, 4 Co. 123, a party can not set up intoxication in avoidance of his contract under any circumstances. Although Lord Coke admits that a drunkard, for the time of his drunkenness, is *non compos mentis*, yet he says: "His drunkenness shall not extenuate his act or offense, but doth aggravate his offense and doth not derogate from his act, as well touching his life, lands and goods as anything that concerns him." He makes no distinction between criminal and civil cases, nor intimates any qualification of his doctrine, on the ground of the drunkenness being procured by the contrivance of another who would profit by it. His doctrine is general, and without any qualification whatever, and connected with it he holds that a party shall not be allowed to stultify himself, or disable himself, on the ground of idiocy or lunacy. The latter proposition is supported, it is true, by two or three cases in the year-books during the reigns of Edward III. and Henry VI.; by Littleton, s. 405, who lived in the time of Henry VI., and by *Stroud v. Marshall*, Cro. Eliz. 398, and *Cross v. Andrews*, Id. 622. Sir William Blackstone, however, who traces the progress of this notion, as he calls it, considers it contrary to reason, and shows that such was not the ancient common law. The Register, it appears, contains a writ for the alienor himself, to recover lands aliened by him during his insanity; and Britton states that insanity is a sufficient plea for a man to avoid his own bond. Fitzherbert also contends: "That it stands with reason that a man should show how he was visited by the act of God with infirmity, by which he lost his memory and discretion for a time." Blackstone considers the rule as having been handed down from the loose cases in the time of Edward III. and Henry VI., founded upon the absurd reasoning that a man can not know in his sanity what he did when he was *non compos mentis*; and he says later opinions, feeling the inconvenience of the rule, have in many points endeavored to restrain it: 2 Bl. Com. 291. In *Thompson v. Leach*, 3 Mod. 301, it was held that the deed of a man *non compos mentis* was not merely voidable, but was

void *ab initio*, for want of capacity to bind himself or his property.

In *Yates v. Boen*, 2 Str. 1104, the defendant pleaded *non est factum* to debt on articles, and upon the trial offered to give lunacy in evidence. The chief justice at first thought it ought not to be admitted upon the rule in *Beverley's case*, that a man shall not stultify himself, but upon the authority of *Smith v. Can*, in 1728, where Chief Baron Pengelley in a like case admitted it, and on considering the case of *Thompson v. Leach*, the chief justice suffered it to be given in evidence, and the plaintiff became nonsuit. The most approved elementary writers and compilers of the law refer to this case, and lay it down as settled law that lunacy may be given in evidence on the plea of *non est factum*, by the party himself; and it is said to have been so ruled by Lord Mansfield in *Chamberlain of London v. Evans*, mentioned in note to 1 Chit. Pl. 470. In this country, it has been decided in several instances, that a party may take advantage of his own disability, and avoid his contract by *Rice v. Peet*, 15 Johns. 503; *Webster v. Woodford*, 3 Day, 90. showing that he was insane and incapable of contracting: These decisions are founded in the law of nature and of justice, and go upon the plain and true ground, that the contract of a party *non compos mentis* is absolutely void, and not binding upon him. The rule in *Beverley's case*, as to lunacy, therefore, is not only opposed to the ancient common law, and numerous authorities of great weight, but to the principles of natural right and justice, and can not be recognized as law; and it is apprehended, that the case is as little to be regarded, as authority in respect to intoxication, which rests essentially upon the same principle.

It is laid down in Buller's N. P. 172, and appears to have been decided by Lord Holt in *Cole v. Robins*, there cited, that the defendant may give in evidence, under the plea of *non est factum* to a bond, that he was made to sign it when he was so drunk that he did not know what he did. And in *Pitt v. Smith*, 3 Campb. Cas. 33, where an objection was made to an attesting witness being asked whether the defendant was not in a complete state of intoxication when he executed the agreement, Lord Ellenborough says: "You have alleged that there was an agreement between the parties; but there was no agreement if the defendant was intoxicated in the manner supposed. He had not an agreeing mind. Intoxication is good evidence upon a plea of *non est factum* to a deed of *non concessit* to a grant, and

of *non-assumpsit* to a promise." Chitty, Selwyn and Phillips lay down the same doctrine, and Judge Swift, in his Digest, says that an agreement signed by a man in a complete state of intoxication is void: 1 Chit. Pl. 470; Selw. N. P. 563; 1 Phil. Ev. 128; 1 Swift's Dig. 173. In these various authorities it is laid down generally, and without any qualification, that drunkenness is a defense, and no intimation is made of any distinction founded on the intoxication being procured by the party claiming the benefit of the contract. It is true that in *Johnson v. Medlicott*, 3 P. Wms. 130, that circumstance was considered essential to entitle the party to relief in equity against his contract. Sir Joseph Jekyl held that the having been in drink was not any reason to relieve a man against his deed or agreement, unless the party was drawn into drink by the management or contrivance of him who gained the deed; but from what is said in 1 Fonbl. Eq. 60, it would not seem that the author considered this circumstance as indispensable. He says equity will relieve, especially if the drunkenness were caused by the fraud or contrivance of the other party, and he is so excessively drunk, that he is utterly deprived of the use of his reason or understanding; for it can by no means be a serious and deliberate consent, and without this no contract can be binding by the law of nature. In *Spiers v. Higgins*, decided at the rolls in 1814, and cited in 1 Madd. Ch. 304, a bill filed for a specific performance of an agreement, which was entered into with the defendant when drunk, was dismissed with costs, although the plaintiff did not contribute to make the defendant drunk.

On principle it would seem impossible to maintain that a contract entered into by a party when in a state of complete intoxication and deprived of the use of his reason is binding upon him whether he was drawn into that situation by the contrivance of the other party or not. It is an elementary principle of law that it is of the essence of every contract that the party to be bound should consent to whatever is stipulated, otherwise no obligation is imposed upon him. If he has not the command of his reason, he has not the power to give his assent and is incapable of entering into a contract to bind himself. Accordingly Pothier holds, vol. 1 c. 1, a. 4, sec. 1, that ebriety, when it is such as to take away the use of reason, renders the person who is in that condition, while it continues, unable to contract, since it renders him incapable of assent. And it seems Heineccius and Puffendorf both consider contracts entered into under such circumstances as invalid.

By the Scotch law, also, an obligation granted by a person while he is in a state of absolute and total drunkenness is ineffectual, because the grantor is incapable of consent, but a lesser degree of drunkenness, which only darkens reason, is not sufficient: Ersk. Inst. 447. The author of the late excellent treatise on the principles and practice of the court of chancery, after reviewing the various cases in equity on the subject, and citing the Scotch law with approbation, observes: "The distinction thus taken seems reasonable; for it never can be said that a person absolutely drunk, has that freedom of mind generally esteemed necessary to a deliberate consent to a contract; the reasoning faculty is for a time deposed. At law it has been held that upon *non est factum* the defendant may give in evidence that they made him sign the bond when he was so drunk that he did not know what he did. So a will made by a drunken man is invalid. And will a court of equity be less indulgent to human frailty? It seems to be a fraud to make a contract with a man who is so drunk as to be incapable of deliberation:" 1 Madd. Ch. 302. Mr. Maddock seems to consider it as settled that at law complete intoxication is a defense, and that it ought to be a sufficient ground for relief in equity, and indeed it would seem difficult to come to a different conclusion. As it respects crimes and torts, sound policy forbids that intoxication should be an excuse; for if it were, under actual or feigned intoxication the most atrocious crimes and injuries might be committed with impunity. But in questions of mere civil concern, arising *ex contractu*, and affecting the rights of property merely, policy does not require that any one should derive an unjust profit from a bargain made with a person in a state of intoxication, although brought upon himself by his own fault, or that he should be a prey to the arts and circumvention of others, and be ruined or even embarrassed by a bargain, when thus deprived of his reason. It is a violation of moral duty to take advantage of a man in that defenseless situation, and draw him into a contract; and if the intoxication is such as to deprive him of the use of his reason, it can not be very material whether it was procured by the other party or was purely voluntary. The former circumstance would only stamp the transaction with deeper turpitude, and make it a more aggravated fraud. The evidence which was offered and rejected at the trial in the case before us went not only to show that the defendant was so intoxicated at the time of giving the note as to be incapable of the exercise of his understanding, but that the contract was grossly unequal and unreasonable; and both on

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principle and authority we think the evidence was admissible, and that a new trial must be granted.

New trial granted.

CONTRACT BY PERSON INTOXICATED.—As to the validity of a contract made by a person who is intoxicated, see the note to *Wade v. Colbert*, 12 Am. Dec. 653.

MARTIN v. BIGELOW.

[2 ATKINS, 184.]

COMMON LAW RULE AS TO WATER-RIGHTS is that each owner of land through which a stream of water flows is entitled to have it flow in its natural course, and may have an action for any diversion of it to his injury.

THERE MUST BE A PREVIOUS APPROPRIATION of the water to some use by such land-owner before he can be said to sustain any damage.

COMMON LAW RULE IS MODIFIED IN VERMONT as being inapplicable to our circumstances.

PRIOR OCCUPANCY OF WATER of a stream by an owner of land through which it flows, as by erecting a mill thereon, does not, in this state, give the proprietor a right to prevent a land-owner above on the same stream from using the water in a prudent way without wanton waste as it flows down its natural channel, even though he be somewhat damnified thereby, if such prior occupancy has not continued for fifteen years.

TRESPASS *quare clausum fregit* tried in the county court. It appeared that the plaintiff was the owner of certain land through which a stream of water flowed, and had erected a mill and dam thereon, and the trespass complained of was that the defendant entered upon the land and removed the plaintiff's waste-gate. It was proved on the part of the defendant that he was the owner of certain land on the same stream below the plaintiff, upon which a saw-mill had been erected and used by the defendant, and those under whom he claimed for several years prior to the erection of the plaintiff's mill and dam; that when the plaintiff's dam was erected the water was thereby obstructed and the defendant was prevented from using the water in so advantageous a manner as formerly at his said mill, and was, therefore, damnified by the plaintiff's erection of said dam; and that the defendant removed the plaintiff's waste-gate for the purpose of permitting the water to flow freely, as formerly, to his, the defendant's mill. It did not appear that the plaintiff had wantonly wasted or obstructed the water.

The court instructed the jury that if the defendant had erected his mill and was in the use thereof before the erection of the plaintiff's dam, and had sustained damage by the plaintiff's

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obstruction of the water, the plaintiff was not entitled to a verdict. Verdict for the defendant. Motion for a new trial founded on exceptions to the instructions, certified to this court from the county court.

Moses Strong, R. C. Royce, and S. S. Phelps, for the plaintiff

C. Langdon and John Kellogg, for the defendant.

HUTCHINSON, J. It appears, by the case, that the defendant erected his mill before the plaintiff erected his, but it does not appear how long before; nothing shows it to have been fifteen years before. And the case negatives any wanton waste or obstruction on the part of the plaintiff.

The decision of the county court, which we now review, presents this question, merely, whether the defendant's having first appropriated the water of the stream to the use of his mill, entitled him to the water without such obstruction as was created by the plaintiff's use of the water at his mill? No objection is raised to the method used by the defendant to assert his right, if his right be as he contends for.

The common law of England seems to be that each landowner, through whose land a stream of water flows, has a right to the water in its natural course, and any diversion of the same to his injury, gives him a right of action. He must have previously appropriated it to some use, before he can be said to sustain any damage. If this common law is to govern, it supports the defendant in his defense. But the court consider it not applicable to our circumstances, and not of binding force here. There must have been a time when it was not applicable, so as to do justice in all cases in England. Should this principle be adopted here, its effect would be to let the man who should first erect mills upon a small river or brook, control the whole and defeat all the mill privileges from his mills to the source.

I, for one, should like to see some old case in point; some case in which the injury complained of was merely the prudent use of the water, with machinery proportioned to the stream; after which use it flows down its natural channel.

Not only the interest of those who own water privileges, but of the surrounding inhabitants, seems to require that mills should be erected in suitable different places on the same stream. The cases cited at the bar seem all to be either diversions of the water out of its channel, or such obstructions as effect a visible, if not a wanton waste. At least none of them

are like the present case, which negatives any imprudent use or wanton waste of the water. The case of *Platt v. Johnson*, 15 Johns. 213 [8 Am. Dec. 233], noted on the plaintiff's brief, but not produced at the hearing, is found, upon the reading, to be full in point, in favor of the plaintiff upon the question now submitted.

Questions relating to water privileges, of great importance to our citizens, must arise and be decided; and this court are disposed to be careful not to anticipate them before they come properly before the court; and while we are ready to decide in this case that the mere prior occupancy of the water by the defendant does not give him a right to prevent the plaintiff from using the same water in a prudent way, as it flows down its channel, we wish it fully understood that we give no intimation what our opinion would have been had the defendant proved an occupancy of the water for his mills, more than fifteen years before the plaintiff erected his.

SKINNER, C. J. As I presided at the trial in the county court, it may be proper that I make some remarks. I should have preferred at that time that the whole case should have come up, but the counsel chose to put the case on the present ground. Sitting as I did, I chose to give to the jury the rule of the common law. But I then thought, as I now do, that we are authorized by the statute adopting the common law, to say how far it is applicable to our circumstances. I perfectly concur in the opinion now given.

PRENTISS and ROYCE, JJ., concurred.

New trial granted.

RIGHTS IN WATER-COURSE.—This subject is discussed in the note to *Gardner v. Newburgh*, 7 Am. Dec. 531. See also *Strickler v. Todd*, 13 Am. Dec. 649; *Campbell v. Smith*, 14 Id. 400; *Cook v. Hull*, 15 Id. 208; *Coalter v. Hunter*, Id. 726.

RAYMOND v. ROBERTS.

[2 AIKENS, 204.]

PAROL EVIDENCE, VARYING OR CONTRADICTING A RECEIPT, is admissible if such receipt contains general or vague expressions, but if it is definitely descriptive of what is intended to be affected by it, it can not be assailed by parol testimony, except on the ground of fraud.

DIFFERENT WRITINGS MAY BE CONSTRUED TOGETHER as one instrument, if they are between the same parties and upon the same subject, and especially if executed at the same time.

ASSIGNMENT AND RECEIPT OF GOODS to be applied on a particular debt, constitute one entire contract.

PAROL EVIDENCE AFFECTING SUCH CONTRACT is admissible to prove that there were other goods, not mentioned therein, sold at the same time to be applied upon the same debt, but not to contradict the contract by showing that part of the goods embraced in the assignment were not included in the receipt fixing the price agreed on.

ASSUMPSIT for goods sold and delivered, brought in the county court. Plea, *non assumpsit*. At the trial the plaintiff proved a contract signed by Benjamin Roberts, the defendant, dated July 11, 1820, whereby the said defendant agreed that in case one Jonathan Roberts should purchase a certain stock of goods of the plaintiff, he, the defendant, would be "jointly accountable with the said Jonathan for the payment at the time and in the manner" agreed on. He also proved a sale of goods to the said Jonathan, in view of the said contract, to the amount of about four thousand dollars. The defendant introduced in evidence the following receipt signed by the plaintiff: "Received, Manchester, June 1, 1822, of Jonathan Roberts, three thousand dollars in goods, which is to apply on an account I hold against the said Jonathan and Benjamin Roberts." He also offered parol evidence to prove that the said receipt was given for goods in the store of Jonathan Roberts assigned by him to the plaintiff; that the amount was not then ascertained, but that the plaintiff agreed to take an inventory, and if the amount exceeded three thousand dollars, to apply the overplus upon the plaintiff's aforesaid claim against the defendant and Jonathan Roberts; and that there were in fact in the store certain unopened goods, and certain other goods in Troy, which were not included in the receipt for three thousand dollars, and which the plaintiff had agreed to apply on his account with the defendant and the said Jonathan. The plaintiff objected to the evidence, and in support of his objection introduced a written assignment from the said Jonathan, dated June 1, 1822, of the following tenor: "For and in consideration of the sum of three thousand dollars, I hereby assign, sell and transfer unto Samuel C. Raymond all the goods which is now in the store, also one tierce and one box hardware, also one crate and one tierce crockery and glassware, which is now in Troy." The court thereupon rejected the parol evidence offered by the defendant, to which the defendant excepted. Verdict for the plaintiff, and motion for a new trial, founded on the foregoing exception, which motion was certified to this court for decision.

C. Sheldon, J. Sargeant and P. Smith, for the motion, contended that the evidence offered by the defendant was admissible, citing *Straton v. Rastall*, 2 T. R. 366; *Rex v. Scammonden*, 3 Id. 474; *Rex v. Laindon*, 8 Id. 379; *McKinstry v. Pearsall*, 3 Johns. 319; *Tobey v. Barber*, 5 Id. 67 [4 Am. Dec. 326]; *Kip v. Deniston*, 4 Id. 23; *Shephard v. Little*, 14 Id. 210; *Velie v. Myres*, Id. 165; *Dodge v. Billings*, 2 D. Chip. 26; *Stackpole v. Arnold*, 11 Mass. 27 [6 Am. Dec. 150]; *Wilkinson v. Scott*, 17 Id. 249; *Davenport v. Mason*, 15 Id. 85; *Harris v. Johnston*, 3 Cranch, 311; *Maryland Ins. Co. v. Ruden*, 6 Id. 338.

Milo L. Bennett and John Aiken, contra, cited *Preston v. Merceau*, 2 W. Bl. 1249; *Schermerhorn v. Vanderheyden*, 1 Johns. 139 [3 Am. Dec. 304].

By Court, HUTCHINSON, J. The counsel for the defendant apply their arguments to the receipt and assignment separately, and urge that by authorities cited parol testimony ought to be admitted to contradict a receipt in its collateral, though not in its direct consequences. That the receipt is general, not naming what goods; that the assignment binds not as to the amount of the consideration, but the truth may be shown by parol, as in several cases cited, of receipts and deeds.

In the several cases cited, of a recovery of the value of real estate, notwithstanding the recital in the deed that the consideration was received, there is a seeming departure from the rule not to admit parol testimony to contradict a writing; for if the consideration was received, as the deed recites, the inference drawn is, that the same is not still due. But the true reason of those decisions is, that the receipt of the consideration is not in money, but in a separate contract to pay at a future day. That contract may be in writing, as a note, or rest in parol, for future payment. The deed says the consideration was received, but does not say how. Proving that it was received in a promise to pay in six months, does not contradict the deed.

The true reason why receipts are open to parol investigation, and to be varied in their operation and even contradicted, according to the cases cited, is, that they are usually general in their expressions, and many matters, not thought of at the time, might otherwise be controlled by their general expressions, contrary to right and contrary to the intention of the parties; and many mistakes are made in settlements, to correct which, the doors of justice should not be shut by the general

terms of a receipt, which describes no particulars of what is settled.

But when a receipt contains no general or vague expressions, but all is definitely descriptive of what is intended to be affected by it, such a receipt, like other writings in general, must not be assailed with parol testimony, unless on the ground of fraud.

Each of these instruments, the receipt and assignment, partakes in some degree of that generality which might be affected by parol testimony, in those parts which are only general. The receipt signed by the plaintiff is for three thousand dollars in goods. The defendant's counsel, in viewing this by itself, have well observed that as this does not describe what goods, they are at liberty to show what, and also to show other goods beside these, which the plaintiff received in payment of his demand.

But it is a sound principle, that different writings upon the same subject, between the same parties, and especially if executed at the same time, are to be construed together, and treated as one instrument. Apply this rule to these papers, put them together, and they form one entire special contract, by which the defendant, or Jonathan Roberts, sells to the plaintiff, for three thousand dollars, all the goods in the store, also one tierce and one box of hardware, also one crate and one tierce of crockery and glassware which were then in Troy, and the plaintiff agrees to give him for the same three thousand dollars, and make payment by applying that sum on his demand, which is the subject of this suit. Letting these stand thus as one contract, still it would have been proper for the defendant to show by parol proof, that other goods were sold at the same time that were to apply in payment of the same debt, and not included in this description. In doing this, he might have shown what store was alluded to in the assignment, all the goods in which were conveyed to the plaintiff; then show a sale of others elsewhere. So, of two towns by the name of Troy, he might show which was intended. Or, if there were at Troy more boxes and tierces than were described in the writing as being sold, either party might introduce parol testimony to show which were intended.

But the testimony offered by the defendant in this case, was offered for no such purpose, nor had it any such tendency. Its object and tendency were to show that a part of the goods named in the assignment, were not included in the receipt which fixes the price agreed upon by the parties. I say agreed by the

parties, for the writings together contain the mutual agreement of both the parties, for the sale and the price to be paid, and the mode of payment. The tendency, then, was to contradict the writings in a point where they are specific, and not assailable with parol testimony, unless on the ground of fraud, which is not here pretended.

The decision of the county court, rejecting this testimony was correct, and the defendant takes nothing by his motion.

Let judgment be entered on the verdict.

PRENTISS, J. I concur in the opinion, though I have no doubt but that parol testimony may be given to contradict a receipt.

PAROL EVIDENCE AFFECTING RECEIPT.—See on this subject *Tobey v. Barber*, 4 Am. Dec. 326; *Grier v. Huston*, 11 Id. 627; and as to the admissibility of parol evidence to contradict or explain the acknowledgment of receipt of consideration in a deed, see *O'Neale v. Lodge*, 1 Am. Dec. 377 and note; *Schemerhorn v. Vanderheyden*, 3 Id. 304 and note; *Bowen v. Bell*, 11 Id. 286; *Graves v. Carter*, Id. 786.

AS TO PAROL EVIDENCE TO EXPLAIN WRITTEN CONTRACTS, generally, see *Bull v. Talbot*, 1 Am. Dec. 62; *Thompson v. White*, Id. 252; *McFarlane v. Moore*, 3 Id. 752; *Coger v. McGee*, 5 Id. 610; *Stackpole v. Arnold*, 6 Id. 150; *Snyder v. Snyder*, Id. 493; *Gatlin v. Kilpatrick*, Id. 557; *Flint v. Sheldon*, 7 Id. 162; *Stevens v. Cooper*, Id. 499; *Barber v. Brace*, 8 Id. 149; *Claremont v. Carlton*, 9 Id. 88; S. C., *Soc v. Johnson*, 10 Id. 644; *Jackson v. Stackhouse*, 12 Id. 514.

ALLEN v. HUNTINGTON.

[2 AIKEN, 249.]

JUDGMENT, WHERE THERE ARE NOT PROPER PLAINTIFFS, as where an action is brought in the names of the selectmen of a town which should have been brought in the name of the town, is conclusive until reversed and can not be collaterally impeached.

JUDGMENT IRREGULARLY OBTAINED is nevertheless a judgment to all intents and purposes until set aside or vacated.

STATUTE DECLARING A THING VOID is often to be construed as making it merely voidable at the instance of a party.

JUDGMENT FOUNDED ON AN ORIGINAL WRIT DECLARED VOID by statute, for want of a particular indorsement, where the statute is silent as to the judgment, is voidable merely and not void.

JUDGMENT, WHEN VOID.—As a general rule, a judgment is void in no case except where it appears from the judgment itself that the court had no jurisdiction.

WHERE AN IRREGULAR JUDGMENT IS SET ASIDE the consequences, as between the parties, are the same as if no judgment had ever existed.

ERRONEOUS JUDGMENT, THOUGH AFTERWARDS REVERSED, affords protection for all acts done under it.

TROVER for a horse, brought in the county court. Plea, the general issue. The defense was that the said horse was taken and sold under an execution issued upon a judgment obtained before a justice of the peace against the plaintiff in an action brought by the selectmen of the town of Acton to recover the expenses of removing a nuisance from the highway, one of the defendants being the constable who made the levy and sale, and the other defendant being one of the selectmen. The plaintiff objected to the evidence offered to prove these facts on the ground that the said judgment and execution were absolutely void: 1. Because the action should have been brought in the name of the town and not in the names of the selectmen; 2. Because it appeared that there was no minute indorsed on the original writ in said action of the day, month, and year when it was signed by the justice, and the same was, therefore, void by the express provision of the statute. The evidence was, however, admitted to which the plaintiff excepted. Verdict for the defendants. Motion for a reversal of the judgment, and a new trial founded on the plaintiff's exceptions certified to this court from the county court.

Charles Phelps and D. Kellogg, for the plaintiff.

J. Hunt, for the defendants.

By Court, **PENNINGTON, J.** The horse for which this action was brought was taken by the defendants, under an execution issued on a judgment recovered in a suit against the plaintiff, by the selectmen of Acton. It was objected on the trial, and is now insisted, that the judgment and execution were irregular and void, and afforded no justification to the defendants.

It is unnecessary to give any opinion whether the action in which the judgment was recovered against the plaintiff could have been properly maintained in the name of the selectmen, or should have been brought in the name of the town; because it is very clear that the question could not be raised in this case. Admitting that the action should have been brought in the name of the town, and that the selectmen could not maintain it, the proceedings are merely erroneous, and not void. The judgment, while it remains in force and unreversed, is conclusive upon the parties, and its merits can not be overhauled, nor can it be impeached in this collateral way.

It is equally unnecessary to determine whether the nature and purpose of the action against the plaintiff were such as to require a minute in writing on the original writ, under the

official signature of the justice, of the day, month, and year, when the writ was presented to and signed by him. We are inclined to think that such minute was not requisite, but it is quite unnecessary to enter at all into that question. The execution issued against the plaintiff was warranted by the judgment; and unless that was *ipso facto* void, and a nullity *ab initio*, the execution affords a good justification to the defendants. The statute which is relied upon declares that every original writ issued in the cases therein mentioned, in which a minute is not made and signed as therein required, shall be void. The statute does not in terms extend to the judgment which may be rendered in the suit commenced by such writ, but it is argued that if the writ is made void the judgment, and all the proceedings consequent upon it, must be void also. It would certainly be going great lengths to hold that the party, after judgment is rendered against him in such case, may treat the judgment as a nullity, and the plaintiff, if he sues out execution upon it, as a trespasser. This would be manifestly inconsistent with the general rules of law as to the conclusive nature of judgments.

The doctrine which prevails in the books is, that a record is of so high a nature that it can not be impugned by the parties to it in any collateral proceeding. If a judgment has been irregularly obtained, it is nevertheless a judgment to all intents and purposes, until set aside or vacated: *Philips v. Biron*, Str. 509; Hammond's N. P. 54. It is often the case that a statute which declares a thing to be void is to be construed as making it voidable merely at the instance of the party; and it would seem that where the statute only declares the original writ void, and is silent as to the judgment, the reasonable construction is, that it is not void, but voidable merely; that is, may be rendered void by plea, or other proper proceeding. The case of *Prigg v. Adams*, 2 Salk. 674, is a very strong authority, and entirely decisive of the point in question. In trespass and false imprisonment the defendant justified as an officer, under a *ca. sa.* on a judgment in the common pleas, upon a verdict of five shillings for a cause of action arising in Bristol. The plaintiff replied the private act of Parliament for erecting the court of conscience in Bristol, wherein was a clause that if any person bring such action in any of the courts of Westminster, and it appeared upon trial to be under forty shillings, that no judgment should be entered for the plaintiff; and that if it be entered, it shall be void. Upon demurrer the question was,

whether the judgment was so far void that the party should take advantage of it in this collateral action. The court held that it was not void, but voidable only by plea of writ of error. The general principle certainly is, that a judgment can be considered void in no case except where it appears from the judgment itself that the court had no jurisdiction. It may be voidable, but not void if rendered by a court of competent jurisdiction; and until it is set aside or vacated it forms a good justification for the proceedings had to enforce it. When an irregular judgment has been set aside, the consequences, as it respects the parties to it, are the same as if no judgment had ever existed; but an erroneous judgment, though afterwards reversed, will afford a protection for all acts done under it.

Judgment for the defendants affirmed.

REVERSAL OF JUDGMENT, EFFECT OF.—See on this point, *Judson v. Eslava*, 12 Am. Dec. 32 and note; *Phillips v. Phillips*, Id. 505 and note; *Betts v. Starr*, 13 Id. 94; *Woodcock v. Bennet*, Id. 568 and note; *Saulet v. Dreu*, 15 Id. 173.

LYMAN v. WHITE RIVER BRIDGE Co.

[2 AIKENS, 255.]

CORPORATION IS LIABLE FOR A TORT committed by its authority.

CASE OR TRESPASS WILL LIE against a corporation for a tort.

VOTE OF A CORPORATION AUTHORIZING AN ACT which is *prima facie* within its corporate powers renders it liable for such act though it turns out to be a trespass; but perhaps it is otherwise where the vote shows on its face that the act is illegal.

VOTE RENDERING A CORPORATION LIABLE TO INDEMNIFY its agents for an act performed thereunder, will make it liable also to the party injured by such act.

CORPORATION ACTS THROUGH AGENTS.—A corporation can do no act except through the instrumentality of others.

ALLEGATION OF TRESPASS BY A CORPORATION.—Where a declaration alleges that a trespass was committed by a corporation, it must be understood on demurrer that an authority to do the act was given either under the corporate seal or by a corporate vote.

TRESPASS *quare clausum fregit* against a corporation. Demurrer and joinder.

Wales, Hubbard and Everett, for the defendants, contended that trespass will not lie against a corporation, citing 1 Chit. Pl. 65, 66; *Doe v. Woodman*, 8 East, 229; Bac. Abr., Corpora-

tion, E. 5; Hammond N. P. 33, 34; *Harman v. Tappenden*, 1 East, 555; Kyd on Corp. 225.

Charles Marsh and T. Hutchinson, for the plaintiff, insisted that corporations stand on the same ground as individuals with respect to liability for torts, citing *Riddle v. Proprietors*, 7 Mass. 182 [5 Am. Dec. 35]; *Mower v. Leicester*, 9 Id. 250 [6 Am. Dec. 63]; *Bush v. Steinman*, 1 Bos. & P. 404; *Yarborough v. Bank of England*, 16 East, 5.

By Court, PRENTISS, J. The action is trespass for breaking and entering the plaintiff's close, and erecting thereon a bridge, with two piers and an abutment, and a toll-gate and toll-house. The defendants have demurred to the declaration; and the general question is, whether an action of trespass will lie against a corporation.

It is urged that as a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law, it can not, as such, commit or be sued for a tort, but the action must be brought against each person who committed the tort by name; and this proposition appears not only to receive countenance but support from some of the authorities. But on looking into the books we find many cases in which actions on the case arising *ex delicto*, where the plea is not guilty, have been maintained against corporations at common law. Mr. Chitty, in his *Treatise on Pleadings*, page 68, lays it down that corporations and incorporated bodies may be sued in that character, in many instances, for neglect of a duty imposed on them by law. In *The Chestnut Hill Turnpike Co. v. Rutter*, 4 Serg. & R. 6 [8 Am. Dec. 675], it was held that an action of trespass on the case will lay against a corporation aggregate for a tort. In *Riddle v. The Proprietors of the Locks and Canals on Merrimack River*, 7 Mass. 187 [5 Am. Dec. 35], it was determined that an action on the case at common law would lie against an aggregate corporation for neglect of a corporate duty by which the plaintiff had suffered damage. In *Rex v. The Corporation of Rippon*, Com. 86, cited in Hammond on Parties to Actions, 262, it is laid down that a corporation may be sued as such in an action on the case for a false return made by them to a mandamus; or the individuals who voted for it may be sued in their private capacities. In *Yarborough v. The Governor and Company of the Bank of England*, 16 East, 6, which was trover for three promissory notes, it was moved after verdict for the plaintiffs to arrest the judgment, on the ground that the action of trover,

which is founded in tort, did not lie against a corporation; but it was determined on a review of all the authorities that the action well lay. This case, and the others referred to, are entirely decisive that a corporation as such may be sued in an action on the case for a tort.

But it is said that, admitting that a corporation is liable in an action on the case for a tort, yet it can not commit a trespass or be answerable in that form of action; but if an action on the case will lie against a corporation for a tort, there seems to be no good reason why trespass will not also lie. The distinction between the two actions is not, whether the act complained of was accompanied with force, or whether there was an intent to do the injury, but whether the injury was the direct and immediate effect of the act complained of, or was the collateral consequence of some act previously done. If a corporation is liable in case for consequential damages proceeding from an act authorized by them, they may and ought to be liable in trespass for an immediate or direct injury, arising from an act authorized by them, or done by their command. Indeed, there seems to be no difference, either on principle or on technical grounds, as to the liability of a corporation in actions of the case *ex delicto*, and actions of trespass. The objections that in trespass the process at common law was *capias*, and that the judgment against the defendant always concluded with a *capiatur*, applies as well to actions of trespass on the case arising *ex delicto*, where the plea is not guilty, as to actions of trespass *vi et armis*; but the objection no longer exists to either action even in England; for the statute of 5 and 6 W. & M., took away the fine in all cases, and no notice is now taken of it in the judgment.

And here, no such judgment was ever entered, and, therefore, this technical objection totally fails; but if it were otherwise, it would not affect the question. In *Riddle v. The Proprietors of the Locks and Canals on Merrimac River* [5 Am. Dec. 85], it was objected that in all actions of trespass and trespass on the case, where the general issue was not guilty, if judgment was against the defendant, a part of the judgment, at common law, was an entry of a *capiatur*, and the corporations having only a legal and not a natural body, no *capiatur* could be awarded against them, and, therefore, no such action lay against a corporation at common law. But Parsons, C. J., says: "That a *capias* does not lie against a corporation is evident, but that no action of trespass lies is questionable; for it is agreed that a corporation may be fined on indictment, and the fine levied by distress; and why

may not a corporation be amerced, and the amercement collected in the same manner." And he goes on to cite a number of ancient cases, in which trespass was held to lie against a corporation; such as trespass for distraining the plaintiff's cattle, until he paid a toll which he was not bound to pay; trespass for disturbing the plaintiff in the profits of his liberties, and for disturbing him in holding a leet; and in an assize as a disseisor with force. He concludes by saying, that it is very clear, from the examination of the old books, that some actions of trespass might, at common law, be maintained against aggregate corporations; and, as in these actions no *capiatur* could be entered, the omission of the entry could be no objection to the action. In *Yarborough v. The Governor and Company of the Bank of England*, Lord Ellenborough considers the objection, that bodies merely corporate, and of an impersonal nature, can not be subject to a *capias*, as of no weight. He states the question to be, whether a corporation can be guilty of a trespass or tort, and he cites numerous cases to show that they may be aiding to a trespass, may give command to enter into land, and may be disseisors. He puts trespass and trover on the same footing, and his opinion proceeds on the ground, that as trespass would lie, trover might, of course, be maintained.

It would seem, then, to be settled by the authorities, that trespass will lie against a corporation; and in reason, and on principle, if a man is injured by any tortious act of a corporation, done by its authority, he ought to have his remedy by action against them as much as against a natural person. In actions in form *ex delicto*, as case, trover, trespass, etc., the rule is that the action may be brought either against the person who actually committed the injury, or against him who commanded or authorized it. And it is a general principle that a corporation is liable for the acts of its servants, agents or officers, while acting within the limits of the authority delegated to them by the corporation, or acting under its command. It is a fallacy to say that because a corporation has no natural existence or physical powers they can not commit a trespass. It is true they can not commit a trespass but through the instrumentality of others; neither can they make a contract, or do any other corporate act whatever, but through the agency of others. A corporation can not do a tort but by their writing under their common seal: 6 Vin. Abr. 289. A corporation can not be aiding to a trespass, nor give warrant to do a trespass without writing: Id. 288. As a corporation, says Lord Ellen-

borough in the case referred to, they can do no act, not even affix their corporate seal to a deed, but through the instrumentality and agency of others; but, he adds, whenever they can competently do, or order any act to be done, which as by their common seal they may do, they are liable to the consequences of such act, if it be of a tortious nature, or to the prejudice of others. It is, therefore, very clear that for any act of a tortious nature which a corporation may, by vote or under their corporate seal, authorize or command to be done, an action in form appropriate to the nature of the injury will lie against them. Considering the numerous incorporated companies, established among us for various purposes, having extensive powers and carrying on extensive business, it seems necessary that this principle should be adopted, for without it the party injured might, in many cases, be without any adequate remedy. It is said that a vote of the members authorizing a trespass can not be binding upon the corporation as such, but must be considered as the act of the individuals voting for it, for which they alone are liable. This would probably be true if the vote, upon the face of it, was to do an illegal act. Where the act is not *prima facie* a trespass, as, if a sheriff take particular goods on a writ by direction of the creditor, or one do an act by the command of another, not knowing it to be illegal or a trespass, he may have an action against the creditor or person commanding, for an indemnity: *Arundle v. Gardner*, Cro. Jac. 652. In *Merryweather v. Nixan*, 8 T. R. 186, Lord Kenyon said that the principle applicable to co-trespassers did not affect cases of indemnity where one man employed another to do an act not unlawful in themselves for the purpose of asserting a right. On this principle the vote of a corporation to do an act *prima facie* within their corporate powers, and to answer the purposes for which they were created, as in this instance to erect a bridge, toll-house, etc., would be binding upon the corporation, although the act might turn out to be a trespass. If the vote would make them liable, as a corporation, to indemnify their agents for performing the act, it must make them directly liable as such to the party injured by it. The principle adopted is, that a corporation, although it can do no act but through the instrumentality and agency of others, is liable in trespass for a tort authorized or commanded by them; and as the trespass in this case is alleged to have been committed by the corporation, it must be taken in demurrer that

an authority to do acts complained of was given either under their corporate seal or by their corporate vote.

Judgment for the plaintiff.

HUTCHINSON, J., being of counsel in the cause, did not sit on the trial.

LIABILITY OF CORPORATIONS FOR TORTS.—This subject is discussed at length in the note to *Orr v. Bank of the United States*, 13 Am. Dec. 596.

MITCHELL v. WALKER.

[2 ALKENS, 266.]

PRESUMPTION OF A GRANT of incorporeal hereditaments arises from an adverse occupancy for fifteen years in analogy to the statute of limitations. **POSSESSION MUST BE ADVERSE** to the true owner to authorize a presumption of a grant.

TO CONSTITUTE SUCH ADVERSE POSSESSION all that is necessary is that it should be accompanied by a claim of right.

CONDITIONAL GRANT may well be presumed from lapse of time.

PRESUMPTION OF A GRANT IS NOT A LEGAL PRESUMPTION, but arises from matter of evidence, and must be drawn by the jury.

ASSERTION OF RIGHT BY THE ORIGINAL OWNER within fifteen years, and an admission thereof by the occupant, either express or implied, will rebut the presumption of a grant, even though such admission is founded on a mistake of facts.

ACTION on the case tried in the county court for taking water from the penstock of the plaintiff's flume for the use of a fulling mill. Plea, the general issue. The plaintiff proved title to the *locus in quo*. The defendant offered evidence tending to show that for thirty years he and those under whom he claimed had enjoyed the right of using the water from the plaintiff's dam in the manner in which the defendant was now using it, they making one fourth part of the necessary repairs upon said dam. The evidence was objected to by the plaintiff as showing merely that the defendant was tenant to the plaintiff, or at most that he had only a conditional right to the use of the water dependent upon his making one fourth of the repairs, and that a conditional right was not the subject of prescription. The court, however, admitted the evidence. The plaintiff, to rebut the same, offered evidence tending to show that when the fulling-mill now owned by the defendant was erected in 1797, Thaddeus Walker, who was then owner thereof, agreed with the person that owned the plaintiff's dam to pay fifty dollars for the use of the water from the said dam,

and to bear one quarter of the expense of making repairs upon the same, and that upon paying the said fifty dollars he was to receive a conveyance of the right; that payment and conveyance were never made; that in 1811, one Comfort Hamilton became the owner of the fulling-mill; that one Murdock being then owner of the plaintiff's dam demanded of the said Hamilton the fulfillment of the contract made with Walker; that Hamilton thereupon agreed to pay the said fifty dollars, with interest from 1797; that the said Hamilton afterwards sold and conveyed to his brother Jude Hamilton, who refused to carry out the agreement, claiming that he and his grantors had obtained a right to the use of the said water by possession; that the said Murdock then took steps to shut off the water, when the said Jude Hamilton proposed to relinquish the old contract, and pay a yearly rent for the use of the water, if the said Murdock would take Comfort Hamilton as paymaster for the rent, which proposition was accepted. The defendant, in rebuttal, offered evidence tending to prove that the Hamiltons made the above-mentioned contracts and agreements through mistake of the facts, and of their rights in the premises, and that the said Hamiltons and the subsequent owners of the fulling-mill had ever since as before made one fourth of the repairs of said dam.

The court charged the jury in substance that if the defendant and those under whom he claimed had used and improved the water, claiming right thereto for more than fifteen years, doing one fourth of the repairs to the dam, the law presumed a grant of the right; that if the Hamiltons made the contract under a mistake of the facts and their rights, although it was made before the expiration of fifteen years from the commencement of the use of the water, such contract would not remove the presumption of a grant. The plaintiff excepted to the instructions. Verdict for the defendant. The exceptions taken at the trial being allowed and certified to this court the plaintiff now moved for a reversal of the judgment and a new trial.

Hutchinson, for the plaintiff.

Collamer, for the defendant.

By Court, SKINNER, C. J. It is insisted by the plaintiff's counsel that to acquire a prescriptive right the exercise and enjoyment thereof for no period of time short of that recognized by the ancient common law, i. e., time whereof the memory of man runneth not to the contrary, is sufficient.

That the principle of presuming a grant by fifteen years pos-

session and use applies to adverse possession, and not to possession received from and held under the owner. That the evidence in this case shows the possession of the defendant and those under whom he claims to have been a tenancy under the plaintiff and his grantors, and the repairs to the dam are in the nature of, and to be considered as, rent.

By repeated decisions of this court the law at this time must be considered as well settled here as in England, that in analogy to the limitation of twenty years, affixed by the statute of James, in England, for entry upon lands by the owner, and here by our statute of limitations of fifteen years, applying to all real and possessory actions, a presumptive right, or more properly, the presumption of a grant to incorporeal hereditaments, arises in the same period of time.

This possession, it is contended by the plaintiff, and correctly, must be adverse to the right and claim of the owner or proprietor. But all that is necessary to constitute such adverse possession and use is, that it must be accompanied by a claim of right on the part of the possessor. From whom that right is claimed to have been derived, whether from the plaintiff or any other is not material. If the right claimed is a mere tenancy, this perhaps might not be presumed to be a permanent estate. In other words, a possession and use for fifteen years under a claim of this description may not, perhaps, raise the presumption of there having been a durable lease. It is, however, unnecessary to examine that question, as we consider the evidence before us in the case does not present the claim of the defendant in the light of a tenancy. In the ordinary case of a tenant, the estate which is used and occupied, and from which profits are derived, is that of the landlord. In this case, the buildings, etc., and all the expenditures are made by the defendant, and it would be the natural and common, though not the legal, presumption that at the time the defendant's grantor erected his mills, etc., he had secured the right to the water by grant, as the whole cost and charge must be a loss, and the establishment useless without it.

The defendant having been in the possession, use and occupation of the easement for more than fifteen years, the jury may and will presume a grant, unless there is something to rebut the presumption. It is urged that the fact that the defendant and those under whom he claims have done, or admitted that they were obliged to do, one quarter the repairs to the dam, is inconsistent with, and contradicts the presumption of a grant.

That a conditional grant can not be presumed. No authority is shown by the plaintiff's counsel to sustain this position, and from looking into the cases referred to by counsel for the defendant, it appears such right may be claimed by prescription, and consequently a grant may be presumed. If in this case the facts will justify the presumption of a grant at all, whether the right in the defendant is conditional, and liable to be defeated by the non-performance of the condition, or is independent of the duty resting upon him to aid in repairing the dam, may be questionable. We are inclined to consider it of the latter description, and if so, there would be no doubt a grant might be presumed.

The language of the court, in its charge to the jury, is: "If the defendant had used and improved the water more than fifteen years, claiming right thereto, the law presumed a grant." It may not be perfectly correct to say the law presumes a grant, inasmuch as it seems to be considered matter of evidence from which the jury are to make the presumption: 3 East, 302; 2 Saund. 175, b. c. d. n. 2; 3 Bing. 115.

The court in the charge further say: "If the Hamiltons made the contract under a mistake of the facts and their rights, although it was made before the expiration of fifteen years from the commencement of the use of the water, such contract would not remove the presumption of a grant." It will be recollected the jury were thus charged on request of the counsel for the defendant, and by consent of the plaintiff's counsel, the latter feeling confident of a verdict in his favor upon the facts. My opinion was then as it now is. The uninterrupted enjoyment of an easement for fifteen years constitutes the presumption of a grant from the original proprietor.

This enjoyment and use must be with the acquiescence of such proprietor, and accompanied with a claim of right on the part of the occupant. An interruption of the occupant, and a claim of right on the part of the proprietor, or an admission of such right by the occupant, either express or implied, will repel the presumption. So use and occupation by mistake will defeat a claim set up on the ground of fifteen years' enjoyment: *Jackson v. Wilkinson*, 3 Barn. & Cres. 413; 2 Saund. 173, d.

In this case there was evidence given tending to show that the plaintiff's grantor, within fifteen years from the commencement of the use of the water by the defendant's grantor, asserted his right, and denied the right of the latter, and that it was mu-

tually agreed between them that the latter should, for certain considerations, hold as tenant of the former.

But it is urged that by reason of the mistake on the part of Hamilton, this agreement can have no effect. The case states that the agreement was made by the Hamiltons under a mistake of the facts and their rights. Although under such circumstances the agreement may not be such as can be enforced against the Hamiltons, yet it constitutes a claim of right set up on the part of the plaintiff, and an admission thereof on the part of the defendant.

It does not appear, from the case, what this right of the Hamiltons was about which they were mistaken. If it was a right to the use of the water acquired otherwise than by occupancy, that right may remain, the agreement notwithstanding.

But before the fifteen years elapsed, the plaintiff having asserted his claim, and the defendant having conceded the right, the plaintiff was thereby lulled to security, and under whatever circumstances the defendant may have made the agreement, the presumption of a grant is thereby repelled.

The defendant's counsel suppose the case is one in which a court of chancery would decree a conveyance, and, therefore, urge that this court will presume one. That when chancery will decree a specific performance in favor of a party, a court of law will not give damages against him. Admitting the doctrine correct, there are no facts before the court by which they would be justified in sustaining the verdict. The case shows that testimony was given tending to prove certain facts; but there is nothing before the court that would warrant the belief of any other than what is supposed necessarily to have been found by the jury. The jury were instructed, that if they found from the evidence that the defendant and those under whom he claimed had occupied the easement, claiming right thereto, for the period of fifteen years before the commencement of the suit, they would presume a grant, notwithstanding the agreement of the parties before referred to. The jury, then, from their verdict, are supposed to have found the use and occupancy for more than fifteen years, and if any contract was made between the parties, the same was made by the defendant, or rather Hamilton, from whom he claims, under a mistake of the facts and his rights. Whether a contract was made or not, does not appear, and if made, in what the mistake consisted can not be learned from the case.

There is nothing before the court to show under what circum-

stances the defendant has enjoyed the use of the easement which he claimed; we can not, therefore, say it would be equitable, or just to render judgment upon the verdict; a new trial, therefore, must be granted.

HUTCHINSON, J., being of counsel for the plaintiff, did not sit on the trial.

PRESCRIPTION FOR WATER-RIGHT.—See, on this point, *Campbell v. Smith*, 14 Am. Dec. 400. As to prescription for a way, see *Lawton v. Rivers*, 13 Am. Dec. 741, and cases cited in the note thereto.

BRADFORD v. BROOKS.

[2 AIKENS, 284.]

RETROSPECTIVE STATUTE REVIVING BARRED CLAIMS.—A statute authorizing a probate court to renew a commission for the allowance of claims upon the estate of a deceased person, after the close of such commission and the expiration of the time limited by the general law for its renewal is retrospective, disturbs vested rights and revives rights which have been extinguished, and is, therefore, unconstitutional.

APPEAL from a decree of the probate court made on the last Tuesday of March, 1825, renewing, for the term of three months, a commission for the examination and allowance of claims against the estate of William Trotter, deceased. It appeared that after the commission heretofore granted on said estate had been closed, and the time limited by statute for its renewal and extension had expired, the legislature passed an act authorizing the probate court to renew the said commission on the application of certain parties named therein, the said parties having been non-residents of the state during the time limited in the former commission, and two of them being minors and there being sufficient estate to pay all existing demands. The decree appealed from was made pursuant to said act upon the application of the parties named therein. The constitutionality of said act was the only question in the case.

D. Smith, for the appellants, contended that said act was unconstitutional, because it was retrospective and disturbed vested rights, citing, among other authorities, *Ward v. Barnard*, 1 Aik. 121; *Bates v. Kimball*, 2 D. Chip. 77; *Holden v. James*, 11 Mass. 396 [6 Am. Dec. 174].

J. Merrill, N. Baylies, and Wm. Upham, contra, cited *Calder v.*

Bull, 3 Dall, 386; Sargeant on Const. Law, 347; *Locke v. Darwin*, 9 Mass. 360; *Wallon v. Baker*, 8 Id. 468; *Whitman v. Hapgood*, 10 Id. 430; *Dash v. Van Kleeck*, 7 Johns. 477 [5 Am. Dec. 291].

By Court SKINNER, C. J. (after stating the facts): The only question submitted is, had the legislature authority to pass the act authorizing the judge of probate to extend the time beyond the time limited by the standing law for the exhibition and allowance of claims against the estate. Without going at length into the principles by which courts ought to be governed, in deciding upon the validity of an act of the legislature, the delicacy and importance of which has ever been felt, and frequently expressed by the court, it will be necessary only, in deciding the case, to compare the principles by which it must be governed, with those which have already been established by the courts.

In the case of *Ward v. Barnard*, 1 Aik. 121, which was an action brought upon a jail bond, and the defendant relied upon a special act of the legislature, discharging his body from imprisonment, the court did not, as suggested by the plaintiff's counsel, rest the decision at all upon the ground that the act was opposed to the constitution of the United States.

The condition of the bond is, that it shall be void on the prisoner's being discharged by due course of law. If, therefore, the act would have been valid but for the constitution of the United States prohibiting the passing of acts impairing the obligation of contracts, it was at least questionable in the view of the court, whether the act of the legislature might not be considered as a discharge according to or by due course of law. If the legislature, by the constitution of this state, have the power to discharge a debtor from the liberties of the prison, the bond conditioned to be void on the debtor's being legally discharged, it may be urged, is a contract, the obligation of which can not be impaired by the exercise of this authority. If the constitution of this state had given to the general assembly the exclusive power of discharging poor debtors on oath, it may well be contended that the contract of the parties, viz., the bond for the liberties having reference to such discharge, would be subject to, and the obligation thereof of course not impaired by, the exercise of this authority. The principles upon which that case was decided, were, that the act was retrospective in its operation; that it tended to take away rights vested and secured

under the existing laws; that it was partial in its operation, taking from or denying to one citizen rights and privileges claimed and exercised by all others in like circumstances, and conferring upon another citizen rights and privileges denied to all others in like circumstances.

In the case of *Bates v. Kimball*,¹ administrator of Barber, which was an action of debt, brought to recover the amount allowed by commissioners of the estate of Barber, deceased, the defendant relied in his defense upon a special act of the legislature, authorizing an appeal to the supreme court, after the regular time for appealing had elapsed. In that case, the act was decided to be void, upon the principle that it was the exercise of judicial power, and also that it was retrospective in its operation, and went to deprive the party of a vested right.

A case very similar to this was decided by this court in Chittenden county, on the last circuit, of *Staniford v. Barry*, administrator of Barry, in which the same doctrine was held by the court. Although it is not necessary to notice the decisions of courts in other states, the case of *Holden v. James*, 11 Mass. 396 [6 Am. Dec. 174], is so directly in point that it may with propriety be referred to. The court in that case say, the legislature have no authority to enact a different rule from that of the standing laws for the government of one particular case, or to repeal a law, or suspend its operation as to certain individuals, or any particular suits, while it remains in force as to all others. It is difficult to distinguish this case in principle from those that have been decided.

It appears to be sure that the persons at whose instance the act was passed, were out of the state, and that two of them were minors. The general law on the subject makes no distinction amongst creditors, whether at home or abroad, whether minors or adults; and if for this cause the legislature have the power to pass a special act suspending the operations of the general law in this particular case, they must have the same power in any case where the cause assigned in their opinion shall make it just. Others having claims against the estates of deceased persons in like circumstances are precluded by the general law.

If the legislature can in this way enable the creditors, whose demands are barred, to obtain satisfaction from the estate of the deceased indirectly, they can authorize suits to be brought and satisfaction to be obtained directly from the estate in the hands of any one to whom it may have passed in a course of distribu-

tion or otherwise, and this at any future period. If they can remove the limitation in this case, which is by the general law two years, they may do the same as to any other limitation.

This act is not general in its operation, extending alike to all in like circumstances. It is retrospective in its effect, and goes to take away rights vested by the general law, and to give rights extinguished by the same general law, and we believe it an act which courts can not enforce.

The decree of the court of probate must therefore be set aside.

STATUTE REVIVING RIGHT TO PRESENT CLAIMS AGAINST DECEDENT.—An act of the legislature reviving the right to present claims against the estate of a deceased person after the statutory time has elapsed, stands upon almost the same ground, with respect to its validity, as an act reviving the right to sue a demand which has been barred by an ordinary statute of limitations. While it is an admitted principle that limitation acts generally pertain merely to the remedy, and are therefore subject to legislative control, yet when the limitation has once attached, the doctrine supported by the most numerous as well as the soundest authorities, is that the party acquires an absolute right to its protection, which can not be taken from him by the legislature. See the note to *Goshen v. Stonington*, 10 Am. Dec. 133, where this subject is discussed. This principle, so far as it affects the right to recover property in the possession of another is thus stated in *Cooley on Const. Lim.*, sec. 365:

“When the period prescribed by statute has once run so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded by the law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect so as to disturb this title. It is vested as completely and perfectly and is as safe from legislative interference as it would have been if it had been perfected in the owner by grant, or by any species of assurance.”

The same doctrine is laid down in more general terms in Mr. Wade's recent and valuable work on *Retroactive Laws*, sec. 197, where he says: “Where the period of limitation has once elapsed, the statutory bar becomes the foundation of a right, of which the party claiming it can not be subsequently deprived by a legislative act repealing the statute of limitation: *Woart v. Winnick*, 3 N. H. 473 [14 Am. Dec. 384]; *Wires v. Farr*, 25 Vt. 41; extending the time, *Knox v. Cleveland*, 13 Wis. 245; *State v. Sneed*, 25 Tex. (Supp.) 69; *Woodman v. Fulton*, 47 Miss. 682; or by an attempt to revive the action, either by statute or constitutional amendment: *Girdner v. Stephens*, 1 Heisk. 280; *Stine v. Bennett*, 13 Minn. 153; *Wright v. Oakley*, 5 Met. 400. This doctrine is applicable to all laws of this character, whether they be general statutes of limitation, or such as have only a particular application to certain actions or proceedings. It in no manner interferes with the right of the legislature to extend the period of limitation upon past as well as future demands, so long as that period has not already elapsed. It merely gives effect to the statute where the time has fully run against the demand, by interposing an obstacle to the revival of a dead claim.”

The authorities upholding this doctrine are numerous. Many of them are referred to in the notes to *Goshen v. Stonington*, 10 Am. Dec. 132; and *Woart v. Winnick*, 14 Id. 393; see, also, the cases cited in the note to Angell on Lim., sec. 22 (6 ed.). There are some cases, however, at variance with this principle: See *Caperton v. Martin*, 4 W. Va. 138; S. C., 6 Am. Rep. 270; *Huffman v. Alderson*, 9 W. Va. 626; *Bender v. Crawford*, 33 Tex. 745; S. C., 7 Am. Rep. 270.

Stronger reasons exist why this general doctrine should be applied to claims against the estates of deceased persons, which have been barred by lapse of time, than to barred demands against living persons. Some of these reasons are well expressed in the learned opinion of Randall, C. J., in *Bradford v. Shine*, 13 Fla. 393. In that case it appeared that there was a statute providing that claims against the estates of deceased persons should be presented within two years, and that if not so presented, they should be barred, and this statute having been repealed by the ordinance of a constitutional convention, it was held that claims against a particular estate which had already been barred were not thereby revived. Randall, C. J., delivering the opinion of the court, said: "The facts as presented by the pleadings are that the maker of the note died, and his administrator proceeded to administer, and published the notice to creditors, and that two years elapsed, whereby, in the language of the statute, the claim was barred. The presumption is, though it is immaterial as affecting the principle, that at the expiration of that time the estate was distributed, if any remained after paying debts, and it may be that the estate was all absorbed in liquidating the claims of creditors of the deceased. What, then, would be the effect of the retroactive suspension of the statute of non-claim? The plaintiff would have judgment against the administrator, and would be entitled to a *pro rata* amount upon his judgment equal to that apportioned to other creditors. Those creditors could not be required to refund from time to time as claims might be presented like that here sued for, and the administrator could not avoid the *pro rata* payment upon the judgments so recovered, because this ordinance being enforced, the statute would afford him or his sureties no defense. But it may be answered the administrator and his sureties might have their relief in the court of chancery against this gross injustice. To which it may be replied, the court of chancery could not afford the supposed relief, because that court is bound by the laws of the state equally with the courts of law, and neither can disregard a positive statute. The court of chancery could not, then, without disregarding the ordinance, afford the proposed relief, and must consider that the statute of non-claim was not in force, and that the administrator had distributed the estate without authority of law, thereby creating a liability against him and his sureties which did not before exist.

"And further in relation to the character of the statute of non-claim. It is a statute of limitation, but unlike the ordinary statutes limiting the time of commencing civil actions, its language is that at the expiration of the time limited the claim is 'barred.' 'A claim against the estate of a deceased person once barred is cut off entirely, since no person has either power or right to revive it by a new promise, or in any other mode:' *Brown v. Leavitt*, 26 N. H. 497. We think this view of the supreme court of New Hampshire is a correct one, but without further consideration we will not say that it is a final conclusion as against any proper action of the sovereign power."

The same principle was applied in *Baggs' Appeal*, 43 Pa. St. 512. In that case an act was passed nearly twelve years after distribution of a decedent's

estate, and a final decree thereon, directing the orphans' court, on petition of any person interested in such estate, to grant a review of the administrator's account and decree distribution with the same effect as if the application had been made in five years, the time limited by the general law, and it was held that this act was unconstitutional and void.

STEELE v. BATES.

[2 AIKENS, 338.]

JUDGE CERTIFYING EXCEPTIONS is not bound to notice points decided to which no exceptions were taken and noted at the time, but he may do so.

VARIANCE IN DATE, WHEN IMMATERIAL.—An allegation that an action was commenced on the twenty-fourth is supported by proof of a writ dated the twenty-fifth, for the day is not material.

PARTY DECOYED FROM ANOTHER STATE OR COUNTRY, on a promise not to sue him, may, upon being sued in violation of the promise, avoid the process, and may also bring an action for his damages by the breach of such promise.

• **IF SUCH PARTY DO NOT AVOID THE PROCESS** on the ground of the fraud, but proceed to trial upon the merits, and judgment go against him, he can not recover the amount of that judgment as damages for the breach of such promise.

JUDGMENT AGAINST A PARTY DECOYED within the jurisdiction of the court for the purpose of service, is conclusive until reversed or set aside.

ACTION for damages tried in the county court for the breach of certain promises. The declaration contained two counts. The first charged in substance that Bates, the defendant, promised that if the plaintiff, who resided in Canada, would come to the town of Derby, in Vermont, to attend an arbitration of certain matters between them, he, the defendant, would not cause the plaintiff to be arrested for any cause, civil or criminal, or sue or harass him; that relying upon said promises, the plaintiff came to Derby, when the defendant, disregarding the said promises, maliciously caused him to be arrested for a pretended assault and battery, and that he was imprisoned under such arrest for two days. The second count charged a similar promise by the defendant not to sue the plaintiff, etc., if he would attend the said arbitration at Derby; that confiding in said promises, the plaintiff came to Derby, accordingly, on September 24, 1822; and that the defendant, not regarding his said promises, did, on the same day and year last aforesaid, sue and commence an action of defamation against the plaintiff, and caused him to be arrested and imprisoned in said action, and put to great loss and inconvenience to his damage in the

sum of one thousand dollars. Plea, the general issue. Verdict and judgment for the plaintiff. The defendant now moved for a new trial on exceptions taken in the county court and certified to this court.

On reading the exceptions here the plaintiff's counsel objected to proceeding upon the decisions as to the admission of testimony, because it did not appear that exceptions thereto had been taken and noted at the time as required by the rules of this court.

By COURT. That rule is for the convenience of the court, and to prevent mistakes. The judge is not bound to certify any other points than those noted, but if he do so it is presumed that he is satisfied that the matter merited further consideration.

William Matlocks, for the defendant.

Cushman and Fletcher, contra.

HUTCHINSON, J. It appears by the case that the plaintiff, in proving the second count of his declaration, offered the record of the writ, service and judgment in the action of slander brought by Bates, upon which writ Steele was arrested when he came out from Canada to attend the arbitration. This it seems was urged as proper, both to show the breach of the promise in the second count and for the purpose of enabling the plaintiff, Steele, to recover back, as damage, the whole amount of the judgment contained in said record. This was objected to on several grounds: 1. On account of the variance in the date of the writ named in the declaration from that contained in the record. This objection is without foundation; for the declaration does not allege what was the date of the writ, but only alleges that on the twenty-fourth day of September, 1822, the defendant did sue and commence an action of defamation against him, etc. This date forming no part of the description of any writing, but only pointing to a time when an act was performed, the day was immaterial, and the record of a writ dated the twenty-fifth of the same month well supports the allegation: See 1 Phil. Ev. 171, 173; 2 Id. 3.

Another objection to this record was, that it could be no ground for the plaintiff's recovering damages in this case, especially as there is no pretense that the judgment has been paid and satisfied. The court overruled the objections and admitted the record. The charge of the court to the jury upon the effect of

this record upon their verdict, may well be considered in connection with their decision to admit the record. The defendant made several points in his request to the court for their instruction to the jury. The second was, that no special damages could be recovered as none were alleged. The third was, that the jury could not take into consideration, in assessing damages, the amount recovered in the action of defamation, as that was adjudicated upon in a court of competent jurisdiction; and the fourth was, that they could only give the immediate, not the remote, damages. The only charge given upon these three points was, that if they found the promises made and broken the plaintiff was entitled to recover all the actual damages he had sustained in consequence of the breach of said promises. By this the jury were warranted to include in their verdict the amount of said judgment, as the record was admitted for that purpose, and the same was not excluded in the charge of the court.

In this the court erred, and a new trial must be granted. It appears by the record that Bates recovered in the county court a little over fifty dollars; and Steele appealed to the supreme court, and the judgment there was one hundred dollars, with a proportionably large bill of costs. If the present plaintiff could, in this action, recover back any part of that judgment, it would be very unjust for him to recover that part which was occasioned by his own appeal to the supreme court. Further, there could be no pretense for his recovering it back or having it included in his verdict, without he first proved that he had paid it. But there is yet a more fatal objection, which was urged and overruled. That was a judgment recovered upon the trial of the merits of an action, regularly pending before a court of competent jurisdiction. It is, therefore, conclusive between the parties so long as that judgment remains in force and unreversed. The present plaintiff, instead of treating the action of defamation as an illegal suit, and abating the writ, and procuring his own discharge from it, elected to treat it as a legal suit, and proceeded to a trial of its merits. That judgment is a conclusive bar to any action Bates can ever bring for the same defamation. It would be strangely unjust that it should be thus valid to bar Bates' cause of action, and yet have no force for him to collect and hold the money as against Steele. Such is not the law. It is binding upon both parties so long as it remains in force.

The court are well agreed thus far; but it escaped our recollection, while together, to consult upon some other points

raised, upon which some directions may be necessary in relation to the future trial of the action. The members of the court present are agreed that the plaintiff can have no claim to recover his costs, in defending the action of ejectment, that accrued after the action was appealed by him. I think myself that he has a claim if he declared for special damages, and if he recovers at all, for a compensation for his trouble in being arrested in the defamation suit, and procuring bail; and, as he must expect the writ would be returned to court, for his trouble and expense in procuring the writ abated and himself discharged. But, from the time he began to defend it as a legal suit, and his expenditures were upon a trial of the merits of the controversy, he has no claim to recover back those expenditures, for it cannot be presumed that it cost him any more to try the merits of the cause in that suit than in any other. But the declaration contains no averment of special damage. There ought, at least, to have been an averment that the plaintiff was put to great trouble, and expended large sums of money, to wit, — dollars, in defending said suit.

SKINNER, C. J. It would have been desirable that the court should have been prepared to give instructions on all the points litigated. I could never consent to say that a man should be permitted to decoy another from a foreign government, and then in violation of his faith to sue him here. I believe the law to be now settled that the process might have been avoided for the fraud. I think, also, that Steele may recover back all costs in the suit up to the time he took an appeal therein. As to the averments in the writ, all expenses that accrue are damages which follow, and may be recovered without being specially alleged.

By the Court. A new trial granted.

The plaintiff then moved for and obtained leave to amend his declaration by charging special damages.

DECOYING PARTY WITHIN JURISDICTION TO BE SUED.—It is well settled that where a creditor by fraud, deceit or contrivance of any kind induces his debtor to come from another state or country, within the jurisdiction of the court, for the purpose of suing him, and then causes process to be served upon him, it will be regarded as an abuse of the process of the court, and the proceedings will be set aside on proper application. Thus, in *Williams v. Reed*, 29 N. J. L. (5 Dutch.) 385, it appeared that the plaintiff induced the defendant, a citizen of New York, to cross over into New Jersey on the false pretense that he wished him to confer with another person on certain business, and then caused a summons to be served upon him, on motion the sum-

mons was set aside. Van Dyke, J., delivering the opinion said: "I shall consider that the fact is abundantly proved that the plaintiff under a mere show or false pretense decoyed and inveigled the defendant when he would not otherwise have come from the state of New York into our jurisdiction, for the sole purpose of having this process served upon him, the arrangement for doing which had been previously made, and the question is, whether the court should sustain this proceeding; whether this is a proper or an improper use of the court's process. I can not suppose the courts were established for any such purpose. To aid in fraud, deceit, or wrong in any form, is no part of their business. To prevent and suppress all such things is their highest duty. To permit a party to take advantage of his own wrong is what the law abhors. I can see but little difference between the case as presented, and the case of seizing a person on the New York side, and carrying him over by force to be served on this side. Surely we would resist this in behalf of our own citizens, if taken from us and subjected to the expense and inconvenience, if not the peril, of a strange and foreign jurisdiction, whether done by force or by gross fraud and deception; and common justice as well as common courtesy to our neighbors requires that we should do to them as we would have them do to us in such cases, and that we should not permit the power of our courts to be successfully invoked to aid in the practice of trickery, dishonesty or oppression of any kind.

"The plaintiff seems disposed to justify himself in this proceeding by attempting to show that he had a cause of action against the defendant. This is disputed; but if we admit it to be so, it can not affect the question before us. If it was a local action that could only be brought in New Jersey there might, for that reason, possibly be something said in extenuation of the course pursued; but no such thing is pretended, and the question is not whether the plaintiff had the right to sue the defendant in a lawful and proper way, but whether he had a right to sue him in an unlawful and improper way, even with a good cause of action."

So where a Massachusetts debtor was decoyed into Connecticut by means of anonymous letters, and his body was then attached in a civil action, the court, on *habeas corpus*, ordered his discharge: *Hill v. Goodrich*, 32 Conn. 588. Ellsworth, J., delivering the opinion said: "It comes then to this, whether a man may be allured by fraud from his own state to another jurisdiction, and there be sued. I think he can not be. You can not do a wrong and on that build a right." So where the defendant, a citizen of Connecticut, was induced to come into the state of New York for the purpose of having an interview and settlement with the plaintiff's clerk, and the interview proving unsatisfactory, the clerk filled out a blank summons with which the plaintiffs had provided him, and served it upon the defendant, the summons was vacated: *Baker v. Wales*, 45 How. Pr. 137; S. C., 14 Abb. Pr. (N. S.) 331. So where a foreigner was induced to come to England by "a concerted trick and fraud" of the plaintiff, and was there arrested in a civil action, the court set aside the whole proceeding as an abuse of process: *Stein v. Valkenburg*, EL BL. & EL 65. So where the plaintiff's agent sent for the debtor, a resident of Canada, to come to his store, near the New York line, to have a settlement, and when he arrived asked him to hitch his horse under a shed on the New York side of the line, and while he was doing so had a summons served upon him, and afterwards attached certain property, the court set aside the summons and attachment: *Metcalf v. Clark*, 41 Barb. 45.

The same principle applies where the defendant is decoyed from one county into another for the purpose of serving process upon him: *Hevener v. Heist*, 9 Phila. 274; *Goupil v. Simonson*, 3 Abb. Pr. 474.

ARRESTING DEFENDANT ON CRIMINAL PROCESS to bring him within the jurisdiction of the court for the purpose of commencing a civil action against him is also an abuse of process, and on motion the proceedings will be set aside. Thus in *Underwood v. Fetter*, 6 N. Y. Leg. Obs. 66, the defendant was brought from another state on a requisition for the purpose of holding him to bail in a civil action, and the court ordered his discharge on putting in common bail on condition that he was not to bring any action for malicious prosecution. So, where a defendant was arrested on a criminal charge in Canada, and brought to New York for the purpose of forcing a compromise, which, proving ineffectual, he was arrested in a civil suit, the court held this a clear abuse of process and ordered his discharge: *Benninghoff v. Oswell*, 37 How. Pr. 235. To the same effect is *Lagrange's case*, 14 Abb. Pr. (N. S.) 335, note. So, in *Addicks v. Bush*, 1 Phila. 19, sundry writs of summons were set aside because it appeared that the defendant had been arrested on a criminal charge and taken from one county to another for the purpose of being sued. But where a fugitive from justice is brought within the state on a *bona fide* criminal charge, and not as a mere pretext, a civil action may be commenced against him: *Williams v. Bacon*, 10 Wend. 636.

The courts sternly discountenance every abuse of their process by which it is attempted to get service upon a party. For instance, where a party is arrested on a criminal charge on Sunday for the purpose of detaining him until Monday in order to serve civil process upon him, such process will be set aside: *Wells v. Gurney*, 8 Barn. & Cress. 769. So, where a defendant was in contempt for not putting in an answer, and an attachment was issued but he could not be found, and, upon his afterwards applying for his discharge in insolvency, the plaintiff's attorney procured an order for his personal examination before the recorder, and as soon as he was released from such examination had the attachment served, the court ordered the defendant's discharge on condition that he would bring no action for damages: *Snelling v. Watrous*, 2 Paige, 314. Walworth, Chancellor, said: "I can not allow a party thus to abuse the process or remedial power of the court." See, also, *Nason v. Esten*, 2 R. I. 337.

ACTION FOR CONSPIRACY FOR DECOYING a defendant within the jurisdiction for the purpose of bringing a suit against him was held to lie in *Phelps v. Goddard*, 4 Am. Dec. 720, although the debt upon which he was sued was honestly due.

MOON v. HAWKS.

[2 ALKENS, 890.]

MERE POSSESSION OF A CHATTEL with the owner's consent, and without any fraudulent or deceptive purpose will not render such chattel liable to the debts or disposition of the possessor.

IF THE POSSESSION IS FRAUDULENT or intended to give the possessor a false credit, of which the jury are to judge, the property may be taken for such possessor's debts.

SALE OR GIFT MAY BE INFERRED from circumstances, where there is no proof of an actual sale.

POSSESSION ALONE IS PRESUMPTIVE EVIDENCE of ownership of a chattel, and if not opposed is sufficient; and the evidence is still stronger if the

possession is accompanied by the exercise of complete acts of ownership for a length of time.

SELLING PART OF A NUMBER OF CHATTELS received at the same time and under the same circumstances, is proper evidence to go to the jury upon the question of ownership of the residue.

REJECTION OF LEGAL AND COMPETENT EVIDENCE tending to prove a material fact is a sufficient ground for awarding a new trial, even though the court should deem such evidence insufficient to change the result.

TRESPASS for taking a certain black mare. The defendant, who was a constable, justified the taking under an execution against one Ramsdell, in whose possession the mare was when she was seized. The question was whether the plaintiff or the said Ramsdell was the owner of the said mare. The evidence offered on that point is sufficiently stated in the opinion. Verdict for the plaintiff. Motion for a new trial on exceptions to the rejection of testimony offered by the defendant to prove the ownership of the property.

A. L. Brown, R. B. Bates and S. H. Hodges, for the plaintiff.

M. Strong, R. C. Royce and C. K. Williams, for the defendant.

By Court, PRENTISS, J. The matter in issue between the parties on the trial was, whether the mare in question, at the time she was taken on the execution, was the property of the plaintiff, or of Ramsdell, the judgment-debtor. The plaintiff having proved that the mare was received by him in payment of a note, given to him and his wife, the mother of Ramsdell, on account of a legacy left her by her father, the defendant offered, and was permitted to prove, that Ramsdell had been in possession of the mare a long time before she was taken by the defendant, using her as his own. Connected with this, the defendant offered to prove that the plaintiff had placed in the hands of Ramsdell, to be disposed of by him for the purchase of lands to become his after the decease of the plaintiff and his wife, certain property which the plaintiff had received on the sale of his wife's right of dower in the estate of her former husband, and that Ramsdell had used and disposed of this property; and also, that at the time the plaintiff received the mare in question, he received a gray mare upon the same note given him for the legacy left his wife, and that Ramsdell, with the knowledge of the plaintiff, and without objection, used and sold the gray mare as his own. This evidence was objected to by the plaintiff, and rejected by the court; and the

inquiry now is, whether it was relevant and pertinent to the issue, and ought to have been admitted.

It is very clear that the mere possession of a personal chattel, with the consent of the owner, will not render the chattel liable to the debts or disposition of the reputed owner. It is true that in England, by the statute of 21 Jac. I, c. 19, sec. 11, property in the possession, order and disposition of a bankrupt is liable to the payment of his debts, and may be sold and disposed of for the benefit of his creditors. But it is otherwise on the principles of the common law, unless the possession is fraudulent, and intended for colorable purposes. If there is no fraudulent or deceptive purpose in view, the property can not be disposed of by the person having it in his possession, nor is it liable to be taken for his debts: *Craig v. Ward*, 9 Johns. 197. If, however, the possession is fraudulent, and intended to give the person having it a false credit, of which the jury are to judge, the property may be taken for his debts. So, where there is no proof of an actual sale, if a sale or gift to him can be inferred from the circumstances of the case, the property may be taken by his creditors, or held under a *bona fide* purchase from him. It is insisted in this case, that the evidence offered by the defendant, although no direct proof of a sale, was proper to be submitted to the jury, as affording a presumption of a sale or gift from the plaintiff to Ramsdell.

Where a fact can not be proved by direct testimony, it is frequently necessary to resort to presumptive proof; and when such proof is given, it imposes upon the other party the necessity of explaining it or rebutting the presumption. It has been held that if the owner of land lays by, and conceals his title, while another is making improvements upon it, inconsistent with his right, and he makes no objection to it, it is evidence to be left to the consideration of the jury, whether he did not mean to be bound by it as an assertion of right: *Wincley v. Pye*, 1 Esp. Cas. 364; *Weakly v. Bucknell*, Cowp. 473; *Keech v. Hall*, Doug. 22. At least, in such case, a court of equity will not permit the owner to resume possession but on terms: *Savage v. Foster*, 9 Mod. 37; *Rex v. Inhabitants of Butterson*, 6 T. R. 554; 2 Atk. 83; 2 Eq. Ca. Abr. 357. With respect to personal chattels, possession alone is presumptive evidence of property, and with nothing to oppose it, is sufficient; and when the possession is accompanied with the exercise of complete acts of ownership for a length of time, it is strong evidence for the consideration of the jury, and requires satisfactory explanation.

It is laid down in a late work, that if one should be in possession of a horse, which once belonged to his neighbor, for a considerable time, using him as his own, without any claim from his neighbor, it would be presumed there had been a sale, unless such neighbor could prove the contrary. And where a son is in possession of property delivered him by his father to use gratuitously, although the relation between the parties may sufficiently explain the possession, and remove any presumption of fraud or ownership arising from that alone, yet it is said that if the father permits the son to sell and replace such property, or to exchange and manage it as though it was his own, this will be evidence that the loan was a mere cover for a gift with intent to deceive and defraud others: 1 Swift's Dig. 273, 766. Although the proof offered in relation to the property received by the plaintiff on the sale of his wife's right of dower, may have been properly rejected, inasmuch as the property was put into Ramsdell's hands for a specific purpose, and he had express authority to dispose of it for the use of the plaintiff, yet we are inclined to think, that the evidence that the gray mare, which was received by the plaintiff with the mare in question, in payment of the legacy to Ramsdell's mother, was used and sold by Ramsdell as his own, ought to have been admitted. It was evidence of the same character as that which had been admitted, and connected with the proof given of Ramsdell's using the mare in question as his own, ought to have been submitted to the jury for them to weigh, and if they thought proper, to infer a sale or gift to Ramsdell. The gray mare and the mare in question were both received by Ramsdell at the same time, and were both in his possession a long time, and used by him as his own. The using and selling as his own, any part of the property thus put into his possession, with the knowledge of the plaintiff, and without any claim being made by him, would not only be evidence against him as to the property thus sold, but as to the remaining property, when attached by a creditor of Ramsdell, or claimed by a purchaser from him. Any act of ownership over either of the horses, while both were in his possession, would be evidence as it respects the other. The question is not on the weight or sufficiency of the evidence, but whether it was proper for the consideration of the jury. Although it might, in our opinion, be insufficient to maintain the issue on the part of the defendant, yet if it was legal and competent evidence, the defendant had a right to have it weighed by the jury with the other circumstances in the case: *Wilkinson*

v. *Scott*, 17 Mass. 249. Whether there was a sale or gift to Ramsdell or not, was a fact for the jury to determine, and whatever evidence had a tendency to prove this fact, should have been submitted to their consideration.

Judgment reversed, and cause remanded to the county court for a new trial.

MYERS v. BROWNELL.

[2 ALKINS, 407.]

NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED evidence will not be granted unless it appear that the evidence was discovered since the trial and is material, and that no laches is imputable to the party.

CUMULATIVE EVIDENCE on a controverted point discovered since the trial is not, as a general rule, a ground for a new trial.

CUMULATIVE EVIDENCE REMOVING ALL DOUBT upon a material point, which was before doubtful, and making it apparent that injustice has been done, will warrant the granting of a new trial.

APPLICATIONS FOR NEW TRIALS are addressed to the sound discretion of the court.

TESTIMONY AS TO DECLARATIONS OR ADMISSIONS of a party is generally to be weighed with caution; yet if the declarations appear to have been understandingly made, and are satisfactorily proved, they are strong evidence against him.

PETITION by the plaintiff for a new trial. The facts are stated in the opinion.

Blackmer, Hall and M. L. Bennett, for the plaintiff.

D. Robinson, jun., D. Sheldon and O. C. Merrill, for the defendant.

By Court, PRENTISS, J. This is a petition founded on new discovered evidence, and brought pursuant to the statute after judgment, for a new trial in an action of ejectment for certain lands in Pownal. Both parties claimed title to the lands under Samuel Card. The plaintiff derived title from the levy of an execution, issued on a judgment rendered in a suit in his favor and against Card, in which the lands were attached on the fifteenth of November, 1820. The defendant's title was derived from a mortgage deed from Card to him, dated March 3, 1817, and lodged in the town clerk's office the same day, on which were indorsed, under the signature of the town clerk, the words, "Received in the office to be recorded when thereto directed, March 3, 1817;" but which was not recorded until August, 1821. The question on the trial was, which was entitled to priority, the defendant's mortgage or the plaintiff's attachment.

As the mortgage was not recorded until after the attachment, the attachment would have priority, unless the record of the mortgage would have relation to the time the deed was lodged in the town clerk's office, which could not be, unless it was left to be recorded, or rather if it was lodged with directions not to record it until further orders. The only material fact in issue, therefore, was, whether the deed was lodged with the town clerk for the purpose of being recorded, or with directions not to record it until further orders.

Thomas Baunister, the town clerk, testified, on the part of the plaintiff, that the defendant and Card came to his house together on the third of March, 1817, when the defendant presented to him the mortgage deed, and requested him to file it for record, but not to record it until further orders; that the defendant and Card both requested him not to mention the circumstance to any one, but to lodge the deed away from the rest of his office papers, and if any one should call to inquire respecting it, to refer them to the records, that it might not be known to Card's creditors; that he complied with the request, and lodged the deed in another room with his private papers, where it remained until August, 1821, when he was directed by the defendant for the first time to record it; that when the deed was handed him, he filed it for record in the usual way, and a year or two afterwards he wrote on the deed "not to be recorded until directed," which words were added to prevent his recording the deed by mistake until he was directed. On the part of the defendant, Samuel Card and Mumford Eldred testified that they went with the defendant to the town clerk's office, at the time the mortgage was left there, and that the deed was lodged in the usual way for record, and not with directions not to record until further orders. Four witnesses testified that the character of Mumford Eldred for truth was bad. On this testimony, which appears to be all the material testimony given on the trial, the jury returned a verdict for the defendant.

Since the trial, the plaintiff, as he alleges, has discovered the testimony of Samuel Wright, and on his testimony the application for a new trial is founded. Wright testifies, that in February, 1821, the day before the defendant bought and took a deed of Card's farm, the defendant told him that he was bail for Card to the bank of Troy, and to others for a considerable amount, probably four thousand dollars in the whole; that Card had gone off, and he was fearful he should suffer a loss, unless

he could get secured on Card's farm; that several years previous to that time he had taken a mortgage deed from Card for his security, and carried it to the town clerk and had it filed for record, but did not direct to have it recorded, but at Card's request, he consented to have it lodged away, for Card was some in debt, and was fearful it would hurt his credit, and stop him in his droving business; that there was talk of taking up the mortgage in six months, and making a different arrangement, but he had neglected to do it, thinking that he and Card should trade for the farm, and had never got the mortgage recorded, and he was fearful it was lost, or that Card had taken it up, and he did not know but by his consent; that the defendant concluded to go that night and find Card, and get a deed of his farm, which he afterwards said he had got, but had to give more for the farm than it was worth, but could do no better; and that the defendant also said he had got security from Card and his sons against the claim or attachment of the plaintiff.

To entitle a party to a new trial on the ground of new discovered evidence, it must appear that the evidence has been discovered since the trial, that no laches is imputable to the party, and that the testimony is material. The plaintiff swears that the testimony of Wright was wholly unknown to him at the time of the trial, and Wright himself says, that the facts within his knowledge were not communicated by him to any one until after the trial. This evidence, therefore, appears to be new discovered, and we see no ground for imputing laches to the plaintiff. With respect to the materiality of the testimony, there appears to be as little doubt. It is testimony to the declarations of the defendant himself as to the manner in which the mortgage was lodged in the town clerk's office, and the purposes and objects for which it was left there. It is objected, however, that the testimony is merely cumulative, and is, therefore, no ground for a new trial. It is true as a general rule, that a new trial will not be granted for the discovery of cumulative facts and circumstances, relating to the same matter, which was principally controverted at the former trial. It has been well observed, that it often happens that neither of the parties know of all the persons who may be acquainted with some of the circumstances relating to the point in controversy, and if suggestions of this sort were listened to, there would be no end to litigation. But this rule must be taken in its proper sense, and is not to be understood as precluding a new trial in every case, where the new testimony relates to a point contested on the

former trial; for if it were so a new trial could seldom, if ever, be granted in any case. The rule, when properly applied, is a salutary guide to the discretion of the court, and where the testimony is strictly cumulative and merely increases the weight of evidence, leaving the cause still in doubt, a new trial will not be granted.

But when the point was left doubtful by the testimony on the former trial, and the new discovered testimony will remove all doubt, or it is apparent that injustice has been done, it is certainly reasonable, and violates no rule, to grant a new trial. Indeed, every application for a new trial is addressed to the sound discretion of the court; and though the law has prescribed general rules for the regulation of this discretion, yet each application, after all, must depend in a great measure on the particular circumstances of the case. In *Lister v. Mundell*, 1 Bos. & P. 427, the court observed that though it was unusual to grant a new trial on evidence contradicting the testimony on which the verdict had proceeded, discovered after the trial, yet as the facts on which two of the witnesses had founded themselves at the trial were falsified by the affidavits produced, they thought it afforded sufficient ground for a new trial. The new discovered testimony in the present case relates to the same fact controverted on the former trial; but it is very obvious that if the witness is to be credited, it is testimony of a very conclusive character. The mortgage, it appears, lay in the town clerk's office more than four years before it was recorded, without any inquiry being made by the defendant respecting it; and from this fact a presumption arises that it was not intended it should be recorded. The town clerk swore unequivocally that the directions were not to record it, and his testimony was corroborated by his certificate on the deed. Card and Eldred swore that the deed was left in the usual way to be recorded; but Card, who was the grantor, from his situation, and especially if a fraud was intended, can not be regarded as an entirely indifferent witness; and Eldred, it appears, was effectually impeached on the trial. The new discovered testimony shows that the defendant explicitly declared that the deed was left with directions not to record it, and the reasons why such directions were given. Although testimony as to the declarations or admissions of a party is in general to be weighed with caution, yet when the declarations appear to have been understandingly made, and are satisfactorily proved, they are strong evidence against him. The testimony does not relate to mere detached

parts of a conversation, or loose, accidental declarations, but gives a clear account of a full and connected conversation on the subject of the deed disclosing all the circumstances attending it, and if believed, must be decisive of the case. No objection is made to the credibility of the witness, and, on the whole, we think that a new trial ought to be granted.

New trial granted.

NEW TRIAL ON GROUND OF NEWLY-DISCOVERED EVIDENCE.—As to what must be shown in an affidavit for a new trial on the ground of newly-discovered evidence, see *Forester v. Guard*, 12 Am. Dec. 141, and the note thereto. It seems that in South Carolina a new trial will not be granted on the ground of newly-discovered oral testimony: *Ecfort v. DesCoudres*, 12 Am. Dec. 609. But the general rule is otherwise: See the note to the case last cited.

BARNARD v. STEVENS.

[2 AIKENS, 429.]

AFTER RETURN-DAY execution can not be executed, and a seizure of property under it will be a trespass.

EXECUTION BEGUN BEFORE THE RETURN-DAY may be completed afterwards.

AMENDMENT OF RETURN may, in general, be made at the term to which the process is returnable, or at any subsequent term, if the rights of third persons will not be affected, and there is something in the record to amend by.

AMENDMENT AFTER ACTION AGAINST SHERIFF.—It would be extremely dangerous to permit an officer to amend his return after the lapse of six years, and after an action commenced against him, by inserting a fact which would go to defeat the action.

AFTER PROCESS IS RETURNED the officer can not alter or amend his return without leave of court.

FEES ON EXECUTION.—If an officer levy under an execution, he is entitled to fees for poundage as well as travel, though the parties compromise before a sale.

WHERE AN EXECUTION IS PAID TO THE CREDITOR before levy or service, and that fact is indorsed on the writ, the officer is not entitled to fees, for he has performed no act to earn any; and as there is nothing due on the writ, no levy can be made.

LIABILITY OF PARTY FOR OFFICER'S ACTS.—For any irregularity of an officer in executing valid process, or for any act not authorized by the process, the party suing it out is not liable unless the officer acts under his orders or direction.

PARTY PRESUMED CONCERNED IN TRESPASS, WHEN.—After verdict for the plaintiff in an action of trespass against an officer who executed process and the party suing it out, for taking certain property, where the exceptions state that the taking was proved without confining it to the officer, it will be presumed that the jury found that the party either directed, or participated in the trespass.

TRESPASS for taking an ox, tried in the county court. Plea, the general issue, with special notice of justification. The taking being proved, the defendants offered in evidence an execution in favor of Bellows, defendant, and against the plaintiff, under which Stevens, the sheriff, also defendant, seized and sold the property. There were two returns on said execution, one dated July 10, 1819, and the other dated April 19, 1820, although it appeared that the latter was actually placed on the execution in the files of the court, September 28, 1826, after the commencement of the present action. The substance of these returns and the remaining facts are sufficiently stated in the opinion. Verdict for the plaintiff, and motion for a new trial founded on exceptions taken at the trial, and certified to this court.

S. Cushman, for the motion.

I. Fletcher, contra.

By Court, **PRENTISS, J.** The court below decided and instructed the jury, that the record of the judgment, execution and officer's return thereon, which was produced and read in evidence on the trial, was no justification of the taking of the ox sued for, and directed the jury to return a verdict for the plaintiff. The case comes here on exceptions filed to the direction thus given to the jury, and the question to be decided is, whether the direction was right.

The execution was dated February 22, 1819, and was returnable within sixty days from the date; and it appeared that it was returned into the clerk's office, July 10, 1820, with a return of the officer indorsed thereon, dated July 10, 1819, in which he certified that he took the ox by virtue of the execution, and, having advertised according to law, sold the same. It is quite obvious that the return thus made could be no justification to the defendants; it was dated July 10, 1819, which was long after the execution had expired, and as the execution could not be executed after the return-day, the act of seizing the ox upon it, after that day, was unauthorized and tortious. If, indeed, the officer had begun to execute the writ before the return-day, he might have completed it after; but it did not appear from the return that he seized the ox within the life of the execution, but rather the reverse appeared, that he took the ox long after the execution had expired. If, in truth, the levy was made before the return-day, though the sale was after, it should have been so certified by the officer.

But on the execution was indorsed a further and additional return of the officer, dated April 19, 1820, in which he certified that on the nineteenth day of April, 1819, he repaired to the dwelling-house of the debtor, and demanded of him the sum of sixteen dollars and fifty-five cents, for his fees on the execution for travel and poundage, and the debtor refusing to pay the same, he seized the ox, advertised, etc., and on the tenth day of July, 1819, sold the same. This return was made and indorsed on the execution by the officer, not only after the present action was commenced against him, but more than six years after the execution was returned into the clerk's office, and without any order or permission from the court; but it is insisted, on the part of the defendant, that an officer has a right to amend his return at any time; and the cases of *Adams v. Robinson*, 1 Pick. 461, and *Thatcher v. Miller*, 11 Mass. 413, are relied upon in support of the position. In the first mentioned case, it was held that an officer who had returned a writ served by him, with a memorandum on it of the time and mode of service merely, but without any signature, might afterwards be permitted, though out of office, to amend and complete his return from his minutes on the writ. In the other case referred to, it was held that the officer might have permission to amend his return, although more than six years had elapsed since the service, and although the defendant had sued out a writ of error to reverse the judgment; but it was subsequently determined in the same case, 13 Mass. 270, that it would be improper to suffer an officer, so long after the service of the writ, to amend his return, by inserting an essential fact, the omission of which might render him liable to an action for damages. The latter decision is founded in good sense, and is directly in point. The additional return on the execution in the case before us was made not only more than six years after the return of the execution into the clerk's office, but after the commencement of the present action, and contained a new and essential fact, which went to defeat the action, by showing that the ox was taken before the return-day of the execution. It is undoubtedly true, as a general rule, that an officer may be permitted to amend his return at the term of the court to which the process is returnable, or, indeed, at any subsequent term, provided the rights of third persons will not be affected by it, and there is something on the record by which the amendment or correction can be made; but it would be extremely dangerous to permit an officer to do this by the insertion of a fact, like the one contained in the amend-

ment in the present case, after the lapse of more than six years, and after an action has been instituted against him. It is further to be observed, that in all the cases cited, where amendments have been allowed, they were made by the order or permission of the court, and it is certain that they can not be otherwise made. After a process is returned, the officer can not alter or amend his return without leave of court. On application to the court, they will allow the amendment or not, and if allowed, it will be on such terms as they think proper to impose. The additional or amended return in this case was not authorized by any order or permission from the court, and on this ground, as well as the other, it could not be regarded as of any validity.

But if the objections already mentioned could be got over, and the return were to be taken as regularly amended, and as evidence of the additional facts stated, it would not avail the defendants. It appeared that on the third of April, 1819, the damages and costs contained in the execution were fully paid, and satisfaction was acknowledged by indorsements on the execution, signed by the creditor. The return stated that the ox was seized on the nineteenth of April after, and was taken and sold to satisfy the officer's fees for travel and poundage. By the statute, fees for travel are allowed "for the service of every writ" and poundage "for levying each execution:" Comp. Stat. 300. If an officer levy under an execution, he will be entitled to fees for poundage as well as travel, though the parties compromise before he proceeds to a sale. Such was the decision in *Alchin v. Wells*, 5 T. R. 470; and, without doubt, the same doctrine would obtain under our statute. But in the present case the execution was paid to the creditor before any service or levy was made, and it so appeared by indorsements on the execution. At the time of the levy there was nothing due to the creditor, nor were any fees due the officer, for he had done no act to earn any; and the execution being fully satisfied, there was nothing for which a levy could be made. In *Shattuck v. Woods*, 1 Pick. 170, it was determined that when an officer received an execution which he did not execute, he was entitled to no compensation; that his fees were for service, and then they were to come out of the debtor; but the debtor could not be charged unless his person or property was taken, or unless he paid the money upon the execution to the officer. The reasonableness as well as justice of this doctrine is quite obvious; and the execution in the present case having been paid to

the creditor before the officer had served or begun to levy it, he had no claim against the plaintiff for fees, and consequently the taking of the ox under it was unauthorized and illegal.

It was urged in the argument that admitting that the officer might be liable, yet that the other defendants were not answerable for his unauthorized act. It is true, that for the irregularity of an officer in executing a valid process, or for any acts of his, beyond the authority which the process confers, the party suing it out is not responsible unless the officer acts under his orders or direction. But as no question of this kind appears to have been made at the trial, and the exceptions state generally that the taking of the ox was proved, without applying the fact to the officer, in exclusion of the other defendants, it must be taken that the jury found either that the officer acted under the orders of the other defendants, or that they were actually concerned in the taking, and considered either way they were equally trespassers with him. In every view of the case we are of opinion that the direction given to the jury was right, and that the judgment of the county court must be affirmed.

Judgment affirmed.

AMENDMENT OF OFFICER'S RETURN.—On this point, see the note to *Malone v. Samuel*, 13 Am. Dec. 173.

OFFICER'S RIGHT TO FEES BEFORE LEVY.—It was held, in *Joslyn v. Tracy*, 19 Vt. 584, that the rule here laid down did not require that an officer before levy should accept a tender of the amount of an execution in his hands, and of the interest thereon, unless his fees were also tendered; but that the decision in the principal case went only to the extent of holding that after payment and acceptance of the amount of an execution the officer had no power to levy for his fees.

AM. DEC. VOL. XVI—

CASES
IN THE
COURT OF APPEALS
OF
VIRGINIA.

HUNTER v. FULCHER.

[5 RANDOLPH, 128.]

EVIDENCE—DEPOSITIONS.—A notice to take a deposition must specify the time and place of the taking of the same.

FOREIGN LAW, AUTHENTICATION OF.—The law of another state is sufficiently authenticated under the act of congress, if the seal of the state is affixed thereto; and a person need only to produce the section of the law so authenticated upon which he relies.

ACTION by plaintiff of assault and battery to recover his freedom. Plea, not guilty. Verdict for plaintiff. Plaintiff offered in evidence the first section of an act of the assembly of Maryland, authenticated by the great seal of that state. Defendant objected that the same was not properly certified and that it was not a full copy of that act. Objection overruled. Defendant also excepted to the reading of certain depositions to the jury. The other facts appear in the opinion. Judgment was entered for plaintiff, and on appeal to the superior court of Henrico, the same was reversed, because the law of Maryland was not certified according to law. From this judgment plaintiff appealed.

French and Southgate, for appellant. The Maryland act was duly authenticated as required by the act of congress: 1 L. U. S. 115, c. 11; *United States v. Johns*, 4 Dall. 416; *Ferguson v. Harwood*, 7 Cranch, 412. That foreign laws might be proved by exemplification under the great seal of a state: *Norris' Peake*, 109, 110; *United States v. Palmer*, 3 Wheat. 624. That it was sufficient to produce that portion of the law upon which

a party relied: *Dive v. Munningham*, 1 Plowd. 60; *Newes v. Lark*, Id. 408.

Daniel, for the appellee. The act of Maryland was not authenticated according to the common law or the act of congress: *Talbert v. Seaman*, 1 Cranch, 1; *Church v. Hubbard*, 2 Id. 237. That the whole act must be certified: 1 Phil. Evid. 289; 4 Bac. Abr. 1, tit. Statutes. That the notice for taking the deposition was too short, and no place appointed for taking the same.

CARR, J. In this case it seems that a written notice of the place of taking the depositions was given to Fulcher, but that being lost, the person who gave it is introduced to prove the notice. He swears, that on the Tuesday before the Saturday on which the justices first met, he gave Fulcher a notice to take the depositions, but he nowhere states in his affidavit a notice of the place of taking them. It is not unlikely that this was stated in his evidence before the court, but omitted in taking down that evidence. We, however, must go by the record, and this seems to be a defect. But this is not the worst. In the certificate of the magistrates, they state that they had met at the mayor's office of Georgetown, on Saturday, the eighth day of October, 1825; and "thereafter, on Friday and Saturday, fourteenth and fifteenth of same month, and thence by adjournment, till Tuesday, eighteenth, for the examination of the witnesses," etc.; and "that no person appeared for Yeatman or Fulcher." The eighth of October was the day on which Fulcher had notice to attend. On that day, it seems, there was a mere meeting. How long it lasted, we are not told; nor did the magistrates adjourn to any further day. How then could Fulcher know that they would meet again on that business? Or what power had they to do so without adjournment? The meeting on the fourteenth and fifteenth was quite a distinct thing, and required a notice as much as the first meeting. I consider the depositions, therefore, as taken wholly without notice and improperly admitted.

As to the Maryland law, it is objected, first, that it is not properly authenticated. I think it is. The act of congress says, that the acts of the several legislatures shall be authenticated by having the seal of their state affixed thereto. This is the whole that is required. Here the seal is certainly affixed, and to this law, and with the sole view of authenticating the law. The mode seems somewhat roundabout; several officers attesting the authenticity of the acts of each other. But this is the

mode which the state authorities have settled, and to them the act meant to leave the matter. In the *United States v. Johns*, 4 Dall. 412, the court, composed of Judges Washington and Peters, say: "The act of congress does not require the attestation of any public officer in this case; although in all the other cases provided for, such an attestation is required. There is good reason for the distinction. The seal is in itself the highest test of authenticity; and leaving the evidence upon that alone, precludes all controversy as to the officer entitled to affix the seal, which is a regulation very different in the different states." Here we have the great seal of the state affixed; and all controversy as to the proper officer to affix it being precluded, we must take it that it is properly affixed.

The next objection, to wit, that this evidence ought not to be admitted because it is one section only of the act, has a greater show of reason in it, but yet is not sound, as I incline to think. The objection rests on this ground, that the whole law is one entire record, and that no part of a record can be used as evidence without exhibiting the whole. This is true of judicial records, and for the best reason—that the whole record is one, and without the whole you can not tell what is the effect of it. But with legislative acts it is different. We know well that some of our acts occupy many pages, and treat of many different parts of an extensive subject, and sometimes of different subjects wholly unconnected with each other. We are told in Plowd. 65, that a statute often contains many branches, and, "that these branches, though contained in one chapter, are several acts of parliament and concern several matters; and then where one branch only serves a man's purpose, it is sufficient for him to recite that only, for the recital of that only is the recital of an entire and several act of parliament;" and if this rule hold in the strictness of pleading, I can not see why it should not as to evidence. The section of the law of Maryland is perfect as to sense and purpose. It enacts that it shall not be lawful to bring a slave into the state, either for sale or residence there; and that any slave brought in contrary to the act shall immediately be free. Now we can not suppose that in this same act there can be any clause contradicting this, and if there should be one narrowing or modifying it, saying, for instance, that where a citizen of Maryland acquires a slave by descent or marriage, he may bring him in, provided that within such a time he has him registered, would not the claimant have to bring himself, by proof, within the proviso? And if you would

hold him to that, would it be any additional burden to say he should produce the law which authorized such proof? The law, if it exist, he may easily produce. The proof may be much more difficult. But, if no such proviso exist, will you require the pauper to prove this negative? My present impression, then, is that the law is well authenticated, and that the section produced is admissible evidence, but that the depositions were improperly admitted, there being no notice.

The judgments of both courts should be reversed and the cause sent back.

The other judges concurred.

¹ THE LAWS OF A FOREIGN COUNTRY are matters of fact for the jury, and must be proved like other questions of fact, but a court must decide what is the proper evidence of such laws: *Kenny v. Clarkson*, 3 Am. Dec. 336; *DeSobry v. DeLaistre*, Id. 535; *Woodbridge v. Austin*, 4 Id. 740; *Brackett v. Norton*, 10 Id. 179; *Mason v. Wash*, 12 Id. 138; *Holley v. Holley*, Id. 342. This subject is discussed at length in the note to *State v. Twitty*, 11 Am. Dec. 780. As to what is sufficient authentication of the acts of the authorities of the United States to entitle the same to be received as evidence, see *White v. St. Guirons*, 12 Id. 56.

GRAFF V. CASTLEMAN.

[6 RANDOLPH, 195.]

PARTIES—HEIRS MAY COMPEL AN ACCOUNTING.—The representatives of an executor may be compelled to account for the proceeds of the estate of a deceased testator by the heirs of the latter, without an administration *de bonis non* on the testator's estate.

TRUST FUND—APPROPRIATION OF.—An executor or trustee has no right to apply to his own use the trust fund; and a purchaser, knowing of the trust, purchases at his peril the trust property so applied.

NOTICE BY RECITALS IN DEED.—A reference in a deed to a will is notice to the grantee of the trusts contained in the will.

APPEAL from the chancery court. The opinion states the case.

Johnson, Stanard and Wickham, for appellants.

Jones and Leigh, contra.

CARR, J. These suits arise out of the will of John D. Orr, and proceedings of his executor and trustee under it. In 1816 Dr. Orr died, leaving a will, by which he devised and bequeathed to his brother, Benjamin G. Orr, his whole estate, real, personal and mixed, upon the following trusts: "In the first place, to sell and dispose of the same, or such part of the same, as he may deem most beneficial for the general interest of my estate,

and to apply the proceeds of the same, or such yearly income or profits as may be made from the same, to the payment of all my just debts; meaning hereby to subject all my estate, real, personal and mixed, to the payment of my just debts, and to leave the application of the same to that purpose, and the mode of raising the necessary funds from the estate to the sound discretion of my said brother. In the second place, after the payment of all my just debts, the surplus of my estate, or the proceeds of the sale thereof, to be given and divided by my said brother to and among my three children, Mary, Ellen and Thomas, in such shares and portions as in the sound discretion and judgment of my said brother, to him shall seem most agreeable and expedient, according to the situation and conduct of my said children. And it is my will and desire that such division and distribution as he shall actually make of my estate among my said children, as aforesaid, or such division and distribution as he shall, by writing, under his hand, or by last will and testament, direct and appoint, shall be valid and binding; it being my intention to place my said brother, in respect to my said children, to all intents and purposes, *in loco parentis*. And it is also my will and intention that he be fully empowered and authorized, not only for the purpose of paying my debts, but to raise and provide a fund for division and distribution among my said children, and for their immediate maintenance, support and education, according as he shall deem it most expedient either to sell or dispose of the same, or any part, in specie, to be applied to the purposes aforesaid." The testator also appointed his said brother guardian of his children and executor of his will, and exempted him from giving bond and security. The executor qualified. On the eleventh of March, 1817, he conveyed to Castleman and McCormick, for the consideration of thirty thousand dollars, payable in installments, a tract of land in Frederick county, belonging to the estate of his testator, called Poplimento, and thus described in the deed: "Formerly the property of Rawleigh Colston, esq., and by him sold and conveyed to the late Dr. John D. Orr, by whom it was devised to the said Benjamin G. Orr, as appears by his will recorded in Frederick county court." On the same day, Castleman and McCormick conveyed the same land to Henry St. George Tucker, in trust to secure the purchase-money. This deed describes the land thus: "The estate called Poplimento, being the same land conveyed to the same Castleman and McCormick by an indenture of even date

herewith, and to be recorded in the county court of Frederick, by reference to which a more complete description of the said land may be obtained."

By deed dated the tenth of December, 1818, Benjamin G. Orr assigns and conveys this deed of trust to Frederick C. Graff, together with the lands and premises therein mentioned, and all the right, title and interest of the said Benjamin G. Orr of, in and to the same. This deed of assignment minutely and particularly describes the deed of trust, and concludes thus: "to which reference is hereby made as a part thereof, as if the same were here fully recited." This deed of assignment was made as a security to Graff for the sum of twelve thousand dollars, to be advanced by him towards completing certain water-works for supplying New Orleans with water "according" says the deed, "to the terms and conditions of a certain agreement, bearing even date herewith, between the said Benjamin G. Orr, Graff and H. Latrobe." This agreement is in the record, and shows a partnership between Orr, Graff and Latrobe in the adventure of supplying New Orleans with water; and that Graff, in purchase of one third of the shares for Orr, and two thirds for himself, was to advance the twelve thousand dollars as they should be wanting for carrying on the work. Before the assignment of the deed of trust to Graff, Castleman and McCormick had paid all the installments which had grown due, leaving five still to be paid, the first on the fifteenth of April, and the others annually on the same day. The installment on the fifteenth of April, 1819, they paid to Graff; and this reimbursed him the three thousand dollars he had advanced to Orr for the purchase of his shares in the water-works. When the time for paying the installment of 1820 was drawing near, Orr gave notice to Castleman and McCormick to pay no more to Graff, as no more was due to him under their agreement. Graff demanded the money; and hereupon, in April, 1820, Castleman and McCormick filed a bill of interpleader in the Winchester chancery court, stating the facts, and calling on the parties to interplead. Pending this bill, Orr, by deed of November 28, 1820, assigned to the Bank of Washington the deed of trust of Castleman and McCormick on the Poplimento land, describing the trust deed particularly, and adding, "to which reference is hereby made as part hereof, as if the same were here fully recited." This assignment recites that it is made as a further security for a debt due from B. G. Orr to the bank. Being informed of this fact, Castleman and McCormick, in April, 1821, filed an amended bill, and made the

bank a party. On the fourth of March, 1822, the children of Dr. Orr gave a written notice to Castleman and McCormick that they claimed the money in their hands, and warning them not to pay to any other person; whereupon Castleman and McCormick, by another amendment, added them to the defendants in their bill of interpleader. In April, 1822, B. G. Orr died intestate, insolvent, and without having made any appointment among the children, in execution of the power given by his brother's will.

The parties defendant (except Graff) answered, setting out their claims. Each party defendant also filed a bill making all the rest defendants. All answered except Graff. It was agreed that his original bill should be taken as the exhibition of his claim; that the children of J. D. Orr and the bank should be taken as parties thereto; and that the exhibits in that case be received in the cases of interpleader.

During the progress of the cause, all the installments, as they became due, were paid into court. In 1823, the children filed their bill against the administratrix of B. G. Orr for an account. She answered that she was willing to account. A reference was had, a report returned, and not being excepted to, was confirmed. It showed a balance of eight thousand and fifty-two dollars and forty-five cents, for which there was a decree when assets. The record of this case is by agreement admitted as an exhibit in behalf of the children; and in 1825, the cases being consolidated, and coming on to be heard by consent, as to all parties, the court rejected the claims of Graff and the bank, and decreed that the receiver pay to the children the money and interest in his hands, deducting the costs of Castleman and McCormick. But the funds in the hands of the children was decreed to be subject to the claims of the creditors of J. D. Orr, if any there be yet unsatisfied, and legally and equitably entitled to come upon that fund. The payment to the children was, therefore, suspended, till they should each give to the marshal bond, with good security, in double the amount decreed to them, conditioned to pay their proportions of any debts which may be established by due course of law against the estate of J. D. Orr, and against the fund in their hands. From this decree the appeal is taken by Graff and the bank.

This cause, so important in its principles, so interesting in its character, has been most elaborately and ably argued by counsel.

The first objection taken to the decree is, that the proper

parties are not before the court. It is insisted that after the death of B. G. Orr, an administrator *de bonis non* of Dr. Orr should have been appointed and made a party to the suit; that the estate of Dr. Orr, for want of this proceeding, is unrepresented; and the case of *Hays v. Hays*, 5 Munf. 418, is relied on where this court dismissed a bill brought by persons suing as children of a deceased residuary legatee, because they were not the legal representatives. This objection seems to me to be founded on a mistake of the nature of the fund. Dr. Orr devised the land to B. G. Orr, and subjected it to the payment of his debts. He also appointed B. G. Orr his executor and trustee. But this did not make the land legal assets. This court decided in *Jones v. Hobson*, 2 Rand. 483, that the proceeds of land devised to be sold are not a testamentary subject; that executors hold such proceeds, not as executors, but as trustees; and that the sureties of an executor are not responsible for the proceeds of land sold by him. Here, the trust embraced not only the payment of debts, but the maintenance and education of the children, the distribution of the surplus among them; a trust highly confidential and personal. An administrator *de bonis non* of Dr. Orr would have nothing to do with this fund, and, therefore, need not be before the court. The fund certainly belongs either to Graff, the bank, or the children; and it will be seen that in decreeing it to the latter, the court of chancery took especial care to protect their father's creditors. This objection, therefore, has nothing in it, in my opinion, and should be rather discountenanced, as the parties went to a hearing by consent, intending to waive all irregularities and come to a decision on the merits.

Taking it up then upon the merits, we are to inquire to which of these claimants the property belongs. All derive title from the will of Dr. Orr; the children directly, the others through the medium of B. G. Orr. By the will it is clear that B. G. Orr was a fiduciary merely, that he had not the slightest beneficiary interest in the estate. It is all devised to him, first, to pay debts; secondly, to distribute among the children. Ample powers and a wide discretion are given him; but solely for the attainment of these objects. All the property is subjected to the payment of his debts; "leaving the mode of raising the funds from the estate to the sound discretion of my brother." After payment of the debts, the surplus is to be divided among his children, "in such shares and proportions as in the sound discretion and judgment of my brother shall seem most agree-

able and expedient." As regards the children, the will places him in *loco parentis*; but this relates merely to his power of managing the fund for them, and distributing it among them. It gives him no individual interest in, or right to, one cent of it. If all the children had died infants he could not, under the will, have claimed an atom of the estate.

But granting all this, it was contended in the argument that under the powers given to B. G. Orr, and the circumstances attending these transactions, the law would compel this court to support the assignments of the deed of trust both to Graff and the bank; and that whether B. G. Orr acted as executor or as trustee in the assignments. Let us examine this, taking him first as executor, and secondly as trustee.

In the cases of *Nugent v. Gifford*, 1 Atk. 463, cited in 2 Ves. 269; *Mead v. Ld. Orrery*, 3 Atk. 235, and *Taner v. Ivie*, 2 Ves. 466, Lord Hardwicke would not suffer creditors or legatees to follow assets into the hands of a purchaser from the executor or administrator, unless there was evidence of fraud or collusion between them. Nor did he consider it evidence of such fraud and collusion that the executor was applying the assets to the payment of his own individual debt, and this with the knowledge of the purchaser.

In *Whale v. Booth*, cited 4 T. R. 625, note, Lord Mansfield went quite as far. He said: "The general rule, both of law and equity, is clear that an executor may dispose of the assets of the testator; that over them he has absolute power; and that they can not be followed by the testator's creditors. It would be monstrous if it were otherwise; for then no one would deal with an executor. He must sell in order to effect the will; but who would buy if liable to be called to an account. It is also clear that if, at the time, the purchaser knows they are assets, that is no evidence of fraud, for all the testator's debts may be satisfied; or if he knows that the debts are not all satisfied, must he look to the application of the money? No one would buy on such terms. There is one exception, indeed, where a contrivance appears between the purchaser and the executor to make a *devastavit*."

These decisions have certainly been much narrowed and modified, if not overruled, by the later cases. Thus in *Bonny v. Bidgard*, 1 Cox, 145, Lord Kenyon, master of the rolls, speaking of the case of *Meade v. Ld. Orrery*, says: "It certainly becomes me to think much before I differ from Lord Hardwicke, but I can not subscribe to his opinion in that case;

and if it had come before me I should have decided it in direct opposition to that authority." "Nothing can be clearer," he says, "than that an executor may go to market with his testator's assets, and that in general a purchaser will not be bound to see to the application of the money; but common honesty requires that if there is either express or implied fraud, the parties shall not avail themselves of it." The circumstances of the case before him were these: R. W. having several leasehold estates, made his will and gave them to his wife and their daughters, to be equally divided between them, and desired that his said estates might be sold the first opportunity as his executors might think most proper; and made his wife, and another, executors. The widow alone proved the will, and entered on the premises. She married Ridgard soon after; they mortgaged the premises to M. and afterwards assigned the equity of redemption to Barnard, and six pounds paid in hand at the date of the assignment. The bill was filed by the daughters and their husbands against Ridgard and wife, Barnard and his vendee, to set aside the assignment to Barnard, and for account, etc. Sir Thomas Sewal, master of the rolls, before whom the cause was first heard, thought that the children should not be prejudiced by the assignment, and decreed accordingly. The cause was reheard before Lord Kenyon. After laying down the general principle before quoted, he applies it thus: "The fund in the hands of the widow was applicable to the payment of the debts, and after that to certain defined purposes declared by the will. Barnard had full notice of the will. He knew that after the debts were paid this fund ought to be so applied; and he therefore connived at its being misapplied. If, then, the case turned on this, I should be bound to set aside the transaction, or rather to turn the defendants into trustees for the plaintiffs." But on the ground of delay (near twenty years having passed after the youngest child came of age, before filing the bill) he dismissed the cause.

The next case I shall cite is *Scott v. Tyler*, 2 Dickens, 712. In that case an executrix as a security for her own debt had disposed of bonds, the assets of her testator, four years after his death. The bankers swore that they knew nothing of the will, and believed the bonds to be her own property, not that of the testator. Lord Thurlow says: "If one concert with an executor by obtaining the testator's effects at a nominal value, or at a fraudulent under-value, or by applying the real value to the purchase of other subjects for his own behoof, or in extin-

guishing the private debt of the executor, or in any other manner contrary to the duty of the office of executor, such concert will involve the seeming purchaser or his pawnee, and make him liable for the value." He concludes: "I think the defendants Hankey must deliver up the bonds and account for the interest they have received upon them." The part of Lord Thurlow's opinion touching these bonds was not delivered in court, because that part of the case was compromised; but in 17 Ves. 165, Lord Eldon says: "With regard to the case of *Scott v. Tyler*, I can confirm the assertion of Mr. Dickens, that the judgment stated by him contains Lord Thurlow's opinion, intended to have been delivered as his judgment, if a compromise had not taken place."

In *Hill v. Simpson*, 7 Ves. 152, Sir William Grant set aside the transfer of assets by an executor to secure his individual debt, under circumstances of gross negligence, though not of direct fraud in the creditors, to whom they were transferred. He says: "Though it may be dangerous at all to restrain the power of purchasing from an executor, what inconvenience can there be in holding that the assets known to be such should not be applied in any case for the executor's debt, unless the creditor could be first satisfied of his right? It may be essential that the executor should have the power to sell the assets; but it is not essential that he should have the power to pay his own creditor; and it is not just that one man's property should be applied to the payment of another man's debt." Of the creditors, he says: "I do not impute to them direct fraud; but they acted rashly, incautiously, and without the common attention used in the ordinary course of business. It was gross negligence not to look at the will, under which alone a title could be given to them."

The case of *McLeod v. Drummond*, 14 Ves. 352; 17 Id. 152, was one of a pledge by the executor of the testator's bonds, upon advances of money. The bill was filed by a co-executor, and it was dismissed by Sir William Grant. The bonds pledged were specifically bequeathed by the testator, and the money was advanced at the time the pledge was made, and upon the credit of it. The master of the rolls said he had found no case where the money had been advanced at the time to the full value of the assets, that it was ever called back. Lord Eldon, on the appeal, affirmed the decree at the rolls, on the length of time and some other particular circumstances; but it seems clear that on the general doctrine he did not agree entirely with

the master of the rolls. He goes into a laborious and able review of all the cases. "The master of the rolls," he says, "truly observes that there is a great difference between advancing money at the time upon securities, and taking a security in discharge of an antecedent debt; but that is by no means conclusive. The argument is carried nearly to this extent, that a person lending money at the time upon the deposit of the securities can hardly be supposed to mean fraud, as there is no temptation to fraud. Admitting, however, that the bankers had no other motive for the advance upon such a deposit than they generally have; if it appears in the transaction itself that the borrower is about to apply the money so raised on the testator's property, to objects with which his affairs have no connection, I should hesitate to say that as the temptation was so slight, this court would not examine whether that was not a most inequitable transaction, with reference to the persons entitled to that property."

I also refer to the case of *Field v. Schieffelin*, 7 Johns. Ch. 150 [11 Am. Dec. 441], where the cases are reviewed by Kent, chancellor, and the conclusion from the whole drawn with his usual clearness and ability.

In the case of *Dodson v. Simpson*, 2 Rand. 294, also, the doctrine is correctly, though briefly laid down.

The latest English case that I have met with is *Keane v. Roberts*, 4 Madd. Ch. 332. There the vice-chancellor gives the result of an examination of all the cases thus: "Every person who acquires personal assets by a breach of trust, or *devastavit* in the executor, is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking, he does not become a party to the breach of trust, by buying or receiving as a pledge, for money advanced to the executor at the time, any part of the personal assets, whether specifically given by the will, or otherwise; because this sale or pledge is held to be *prima facie* consistent with the duty of an executor. Generally speaking, he does become a party to the breach of trust, by buying or receiving in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his private debt; because this sale or pledge is *prima facie* inconsistent with the duty of an executor. I preface both these propositions with the words, generally speaking, because they both seem to admit of exceptions. Thus a sale or pledge for the private debt of the executor has been supported under special circumstances, in Lord Hardwicke's two cases of

Nugent v. Giffard, and *Meade v. Ld. Orrery*, though not entirely to the satisfaction of every succeeding judge; and Lord Eldon seems to consider the case of *McLeod v. Drummond*, as an exception to the first proposition. It was upon the principles of these propositions that Sir W. Grant proceeded in *McLeod v. Drummond*. He there supported the pledges of the testator's bonds because they were deposited in respect of advances made at the time. In the same case Lord Eldon, on the appeal, admitted these principles, but seemed to consider the circumstances of that case as forming an exception to the general rule. The advances, though made at the time, were made to two executors, who were partners as army agents, and necessarily, therefore, for their private purposes; and he inclined to think that the bankers were, for that reason, as much parties to the breach of trust as if they had applied the money to pay the private debt of the executors. "I can not," he adds, "but lean strongly to Lord Eldon's view of that case. If a party dealing with an executor for the personal assets pays his money to the executor, so that it may be applied to the purposes of the will, he is not responsible for the executor's misapplication of it. But, if in dealing with the executor, he does in truth pay his money for the private purposes of the executor, he is equally a party to the breach of trust, whether he applies his money to the private debt of the executor, or to the private trade of the executor." This is a clear statement of the doctrine as settled by a long course of decisions; settled, too, as I think, on the basis of reason and equity; for I heartily agree with Sir William Grant, that it is not essential that an executor should have the power of paying his own creditor with the assets; nor is it just that one man's property should be applied to the payment of another man's debt.

Let us apply this doctrine to the case of the claimants here; and first to Graff, whose case is certainly much the strongest. He took a transfer of the trust property as a security for money to be advanced to the private trade of the executor, a trade having not the slightest connection with the estate of the testator or the objects of the trust. But it is objected that he had no notice of the nature of the fund or the right in which B. G. Orr held it. Of express notice there is no proof; and it is insisted that this is a case to which constructive notice does not apply; that it applies to the purchaser of real estate only, who can not protect himself as a purchaser without notice till he has used due diligence in the examination of his title. No authority is

cited to support this distinction. In all the cases which I have adduced, personal chattels were the subject, and yet the doctrine of implied notice is considered as applying to them, and the case of *Hill v. Simpson* is decided expressly on that ground.

Again: The assignment here was of an incumbrance on land, in effect a mortgage; and we know that the doctrine of constructive notice is constantly applied to such incumbrances. Upon the ground of reason, what difference is there whether the subject be real or personal estate? He who purchases any subject, with notice of the equitable right of another, is a trustee for that other to the extent of his equity; and this, whether the notice be express or implied. Express and implied notice differ, not in their effect, but in their mode of proof only. In the one, you prove the fact of notice expressly; in the other, you prove circumstances which raise a presumption of notice; and if the presumption be strong enough to fix the notice, it affects the conscience of the party just as much as express notice. Thus in any purchase, if there be circumstances which in the exercise of common reason and prudence ought to put a man upon a particular inquiry, he will be presumed to have made that inquiry, and will be charged with notice of every fact which that inquiry would give him; and this conclusion is a just and necessary one, for if a party means to deal fairly, self-interest, the strongest principle of action, will prompt him to the inquiry; and if he means to deal fraudulently, the rule prevents him from voluntarily shutting his eyes and saying he had no notice. This reasoning applies as well to real as personal estate. Both upon reason and authority, then, this is a case to which constructive notice applies, and of this there was the clearest and strongest.

The deed of assignment refers to the deed of trust as a part of itself. The deed of trust refers expressly to the original deed, and that as expressly to the will of Dr. Orr, where the whole trust is declared. Of this trust, then, Graff had full notice, and knew that by the trade, the executor was committing a gross breach of trust. He was a party to that breach, "by paying his money to this private trade of the executor."

But it is said that this was an advancement of money at the time; and it can not be imagined that there was any temptation to the lender to commit a fraud for the purpose of securing the return of that same money which he then had, and might have kept; and Sir William Grant's opinion, in *McLeod v. Drummond*, is relied on. We have seen, however, that Lord Eldon differed

from Sir W. Grant in this; as did the vice-chancellor in *Keane v. Roberts*. But in truth, this was neither an advancement at the time, nor was it a simple loan of money. It was a purchase of shares in the New Orleans water-works, and an agreement to advance, as the money should be wanting for carrying on the work. The strong temptation was held out to Graff, of entering into a speculation by which he might double and treble his money, at the same time that he provided for his safety by taking a security on the trust fund. His case, therefore, does not come at all within the reason of those where a party, meaning simply to lend his money at legal interest, which he can always do, is supposed to lie under no temptation to commit a fraud in taking a security for its return.

I have thus far considered B. G. Orr as executor; but it is, in truth, a case of pure trust, as I have already shown; and this, it will be found, makes it a much stronger case for the *cestuis que trust*. Thus, in *Andrew v. Wrigley*, 4 Bro. C. C. 125, Lord Alvanley, master of the rolls, says: "With respect to a trust for payment of debts, there is no pretense that such a trustee could alien in payment of his own debt;" and he refers to *Ilhel v. Beane*, 1 Ves. 215. There an estate was devised to a son, subject to payment of debts. The son mortgaged the land to a creditor of the father, who also advanced to the son more money. Lord Hardwicke held that this mortgage should interfere in no manner with the rights of the father's other creditors. He says: "This is not like the case of an executor, who, having power to administer the assets, and the legal estate in him, may sell a term, and the vendee retain it, and this even to satisfy a debt of his own. But that is owing to the legal power of an executor over the assets upon which this court will not break in. But it was never held that if a devisee in trust mortgaged to a creditor of his own, for satisfaction or security of that debt, such mortgagee having notice of the trust, should retain the estate against the creditors under that trust."

In *Read v. Snell*, 2 Atk. 642, Lord Hardwicke, in considering the power of executors, who were also trustees, and to whom a very large discretion was given by the will, says: "Here the executors are made trustees, and therefore, from the nature of the thing, are to take nothing for their own benefit, unless it had been particularly given to them. They have no ownership, and therefore can not alter the interests of the *cestuis que trust*."

In *Mabank v. Metcalfe*, 3 Atk. 95, Lord Hardwicke says:

“There is an established difference in this court between an executor and a trustee. For the trustee has the legal right only, and is merely nominal; but an executor has something more in him than the mere legal right as a bare trustee; for he has a beneficial interest, if there is any surplus.”

Dickerson v. Lockyear, 4 Ves. 36,¹ is also a strong case to show the difference between an executor and a trustee. There, an act done by a trustee was set aside, though no fraud was imputed; the chancellor saying that if it had been the act of an executor, he should not have quarreled with it; because the executor had the whole legal property, was bound to pay debts, and might convert assets. “But,” he says, “what was Lockyear’s situation, what was his legal power? He was no executor. He is devisee nominally, it is true, of all the effects; but in trust,” etc., for the purposes of the will. Thus we see that taking B. G. Orr for what he really was, a trustee, the case is still more clear against those who dealt with him.

It was contended in the argument (but as I thought not with confidence), that at the time of the assignment to Graff, B. G. Orr was so far in advance to the estate of his brother as to be authorized to appropriate to his private trade the fifteen thousand dollars due on Poplimento. The answer seems to be that Graff being a purchaser with notice of the trust, dealt with Orr at his peril; that it devolved on him to show Orr’s authority for diverting the trust fund to his individual use; that if he had meant to rely on Orr’s being in advance, he should have made that a part of his case, put it in issue, and had an account settled to establish the fact. Nothing of this kind was done. The fact is not stated in Graff’s bill, and the only evidence we have on the subject is a report made by a commissioner, in a case to which Graff was no party. A report made with no view to the fact of Orr’s being in advance to the estate at any particular time; and which, if evidence at all in Graff’s case, by no means establishes the fact.

I shall waste no time on the case of the bank, which is much weaker than Graff’s, and to which all the law and reasons adduced apply *a multo fortiori*. Nor shall I trouble myself with canvassing the claims of Graff or the bank against B. G. Orr individually. It is enough for the purposes of this cause that they have no claim upon the trust fund.

I am clear that the decree of the court below be affirmed.

1. *Dickerson v. Lockyer*, 4 Ves. 36.

GREEN, COALTER, and CABELL, JJ., concurred, and the decree was affirmed.

BROOKE, President, absent.

NOTICE BY RECITALS IN DEEDS.—Recitals in a deed operate as an estoppel, technically speaking, and bind parties and privies in blood, in estate and in law; but the general rule seems to be that they do not estop mere strangers, or those who claim by title paramount the deed; nor are such recitals binding on persons claiming by an adverse title, nor on persons claiming from the parties by title anterior to the date of the reciting deed, and although, as a matter of fact, a purchaser of real estate may be totally ignorant of the recitals in his own deed, yet every recital of a fact affecting the title to the premises contained in such deed, will be presumed to be known to such purchaser, and he will be affected with notice thereof in the same manner and to the same extent, as though he had actual knowledge: *Marchioness of Anandale*, 2 P. Wms. 432; *Shelley v. Wright*, Willes, 9; *Taylor v. Stibbert*, 2 Ves. jun. 437; *Ford v. Gray*, 1 Salk. 285; *White v. Foster*, 102 Mass. 375; *George v. Kent*, 7 Allen, 16; *Corbett v. Clenny*, 52 Ala. 480; *Carver v. Astor*, 4 Pet. 79; *Baker v. Mather*, 25 Mich. 51; Wade on the Law of Notice, sec. 308. In *Ford v. Gray*, the court said: "That the recital of a lease in a deed of release is good evidence of such lease against the releasor and those claiming under him; but as to others, it is not, without proving that there was such a deed, and that it was lost and destroyed." So in *Baker v. Mather*, 25 Mich. 51, the court, in rendering its decision in that case, used the following language: "It appears, however, that the deed under which the mortgagor held the land expressly referred to this prior mortgage, and made his title subject to it. The deed was not recorded, but this is an immaterial circumstance. Everybody taking a conveyance of, or a lien upon land, takes it with constructive notice of whatever appears in the conveyances which constitute his chain of title."

The same rule applies to recitals in conveyances by the government, and the recitals in such conveyances are as binding on the latter as on a private person, and the government is presumed to have full knowledge of all facts recited in its conveyances, and the same are as available against the government as against a private person: *Commonwealth v. Andre*, 3 Pick. 224; *Carver v. Astor*, 4 Pet. 1, 87; *Branson v. Wirth*, 17 Wall, 32-42; *Penrose v. Griffith*, 4 Binn. 231; *Nieto v. Carpenter*, 7 Cal. 527; *Magee v. Hallett*, 22 Ala. 699; *Opinion in respect to Governor*, 49 Mo. 216. In *Branson v. Wirth*, 17 Wall, 42, Mr. Justice Bradley, in delivering the opinion of the court, said: "No one can set up an estoppel against his own grant. Whoever else might set up the estoppel against Edgerton's title to the lot in question, the government could not do so. Its own patent would stand in its way, and whatever the government could not do, its subsequent grantees could not do." A different opinion, however, seems to prevail in North Carolina and in some of the other states: *Den v. Lunsford*, 4 Dev. & B. 407; *Wallace v. Maxwell*, 10 Ired. 110; *Doe v. Shufford*, 4 Hawks, 116; *State v. Graham*, 23 La. Ann. 402; *People v. Brown*, 67 Ill. 435; *Crane v. Reeder*, 25 Mich. 303; *Farish v. Coon*, 40 Cal. 33.

The recitals in a conveyance are notice only as far as the same affect the title to the property intended to be affected by the conveyance, and a party is not charged with notice of recitals of other matters not necessary to his title. So that when one is purchasing a particular piece of real estate, and the title deeds recite a charge upon, or equitable interest in, another piece in

favor of a third person, such recital would not affect him with notice of such change or interest in the event of his subsequently purchasing the legal title to the other property from the holder: *Hamilton v. Royce*, 3 Sch. & Lef. 315; *Mertens v. Jolliffe*, Amb. 311.

In *Hamilton v. Royce*, 2 Sch. & Lef. 315, the chancellor states the rule as follows: "If a man purchases an estate under a deed which happens to relate also to other lands not comprised in that purchase, and afterwards purchases the other lands, to which an apparent title is made independent of that deed, the former notice of the deed will not of itself affect him in the second transaction, for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase he was then about, nor to take notice of more of the deed than affected his then purchase."

NOTICE OF TRUST to purchaser: See *Maples v. Medlin*, 3 Am. Dec. 687; *Sheperd v. McEvers*, 8 Id. 561.

REES v. CONOCOHEAGUE BANK.

[5 RANDOLPH, 326.]

PLEADINGS—CORPORATIONS.—An allegation that plaintiff is a corporation is unnecessary.

NEGOTIABLE INSTRUMENT, BLANK INDORSEMENT OF.—An indorsement in blank vests the title to a negotiable instrument in the holder.

JUDGMENT BY DEFAULT should be entered in an action on a negotiable instrument subject to any credit indorsed on the note.

THE note in suit was indorsed in blank by Henry and Jesse Payne, and also bore the following indorsement: "Five hundred and fifty dollars received on the within note July 19, 1819." The original was for one thousand eight hundred and ninety-nine dollars. The other facts appear in the opinion. Appeal from a judgment of affirmance of the superior court affirming the judgment of the lower court in favor of plaintiff.

Stanard, for appellant. There was no allegation that plaintiff was a corporation; that the indorsement of the note being in blank, plaintiff had shown no right to collect it: *Clark v. Pigot*, 1 Salk. 126; *Lambert v. Peck*, Id. 128; *Lucas v. Haynes*, Id. 130; Bull. N. P. 275. Also that the judgment should have been entered subject to the credit indorsed on the note.

Johnson, contra, on the first point, cited *Bank of Marietta v. Pindall*, 2 Rand. 465; *Dutch East India Co. v. Henriquez*, 1 Stra. 612. As to the indorsement in blank, he contended that the production of the note was sufficient evidence of the assignment to plaintiff and of his right to sue thereon: *Ritchie v. Moore*, 5 Munf. 388; and that the credit was not signed by any-

body, and that the county court was the proper tribunal to allow the same, and not the appellate court: *Richards v. Brown*, Doug. 114; *Short v. Coffin*, 5 Burr. 2730; *Green v. Bennett*, 1 T. R. 782; *Bent v. Patton*, 1 Rand. 25; *Humphreys v. West*, 3 Rand. 516.

GREEN, J. This case comes up by *supersedeas* to a judgment by default for want of appearance, which was made final in the office without the execution of a writ of inquiry. The suit was in the name of the president and directors of the Conococheague Bank, assignees of Jesse Payne, who was assignee of H. Payne, upon a promissory note dated at Williamsport, payable and negotiable at the Conococheague Bank. The declaration alleges that it was made and assigned in succession by J. Payne and H. Payne at the Conococheague Bank, with a *scilicet* laying the venue in Berkeley county, where the action was brought. The judgment was entered against the defendant, Rees, the drawer of the note, and the bail for his appearance.

Several objections were made in the argument of the cause to this judgment: 1. That there is no averment in the declaration that the Conococheague Bank is a corporation duly constituted, or that "the president and directors of the Conococheague Bank" are authorized by law to sue in that name; 2. That the indorsements, being in blank and not yet filled up, vested no title in the plaintiffs; and, 3. That the judgment was given without regard to a credit indorsed upon the protest filed with the note.

As to the two first objections, I do not think they are well founded. A blank indorsement does not *per se* transfer a title, but is an authority to the holder either to hold it as the agent of the indorser, or to claim it as his own by assignment, at his election, without any further act to be done by the assignors. The blank indorsement is conclusive proof of the assent of the indorser to transfer the note to the holder, if he elects to take it as a transfer. The assent and election of the holder to treat the indorsement as a transfer is proved as well by suing upon it in his own name, as by writing over it an assignment to himself; and it is the assent of both parties to the transfer which perfects it, and not the form in which that assent is evidenced. The possibility that the note might be withdrawn and again put in circulation has no influence upon the question. The defendant could not thereby be injured; for even if it were commercial paper, being past due, the new holder would take it subject to all objections.

It was decided in the case of the *Bank of Marietta v. Pindall*, 2 Rand. 465, that a foreign corporation may sue in our courts upon a contract with them valid according to the laws of the country in which the contract was made, unless it was contrary to the policy of our laws; and that the making a note in Virginia to be negotiated at a foreign bank is not liable to this objection.

Whether the Bank of Conococheague is an incorporated bank or not, or whether they have a legal right to sue in the name of the "president and directors" only, are questions which might have been put in issue by the defendant, or raised upon the trial of the general issue. No averments as to those subjects were necessary in the declaration. In order to maintain their action, it would have been necessary to prove if the defendant had appeared and pleaded that they were incorporated and legally empowered to make the contract under which they claim, and to sue in the manner in which this suit was brought. If they failed to show that they were incorporated, their action could not be maintained. For it is contrary to the act of 1805, re-enacted in 1819, Rev. Code, c. 207, sec. 2, to circulate any note payable to bearer, or any other person, emitted by any banking company not having a charter, whether that company exists in Virginia or elsewhere. If such an unchartered company existing in a foreign country could by the laws of the country contract and sue in the names of their agents, it would be contrary to the policy of our laws for our citizens to procure their notes to be there discounted; since it would tend to violate the law by encouraging the circulation of their notes here. That private corporations may sue without alleging their charter of incorporation, although the courts can not *ex officio* take notice whether they are, or are not, incorporated; and that the question whether they are a legal incorporation or not, and have a right to sue in the name used, are proper to be put in issue by the defendant's plea, or inquired into upon the general issue, appears from the case of *The Mayor and Burgesses of Lynn Regis*, 10 Co. Rep. 120, in which the declaration did not aver the existence of the corporation, but upon the trial of the general issue their charter was produced, and the only question in the cause, therefore, arose, whether the bond, and the suit brought upon it, were in the proper legal name of the corporation.

The third objection is, I think, well taken. A final judgment when no plea is filed, may be rendered in the office at rules, for

principal and interest, when the action is founded upon any instrument in writing for the payment of an ascertained sum of money. But, if the plaintiff, by any paper filed by himself, shows that the defendant is entitled to a credit, the judgment ought either to be entered subject to such credit, or if the plaintiff refuses to take a judgment in that way, a writ of inquiry should be awarded. In this case, if it be doubtful whether the defendant is entitled to the credit indorsed on the protest filed with the note, it was sufficient *prima facie* evidence to prevent a judgment from being given for the whole sum, without a writ of inquiry.

It is objected that this error can not be taken advantage of here, because being a clerical error, it might and ought to have been corrected on motion in the court below. If this be so the plaintiff, as well as the defendant, had a right to have it corrected, and it was as much his fault as that of the defendant, that it was not; and not being corrected, the judgment is erroneous. Indeed the plaintiff might have cured the error by releasing the amount of the credit indorsed upon the protest, if he admitted it to be a credit. But he obviously contests this, by his indorsement on the execution that Mr. Sexton's check would be received in part payment to the amount of five hundred and forty-eight dollars and twenty-five cents, the amount of the credit on protest, deducting one dollar and seventy-five cents, which was the cost of the protest, which they intended to secure in this way, as it was not embraced in the judgment.

The judgment should be reversed, and the proceedings since the common order set aside, and the cause remanded, with directions to send it to the rules, to be there further proceeded in, and a writ of inquiry awarded.

The other judges concurred, and judgment was entered accordingly.

BROOKE, President, absent.

Possession of a note is sufficient evidence of title to enable a person to demand payment of the same when due, and the title of a note indorsed in blank is presumed to be in the holder: *Morris v. Foreman*, 1 Am. Dec. 235; *Jones v. Wescott*, 3 Id. 704; *Bolton v. Harrod*, 13 Id. 306; *Abat v. Rion*, Id. 313.

BROWN v. TOELL'S ADMINISTRATOR.

[5 RANDOLPH, 543.]

EQUITY—RELIEF AGAINST A JUDGMENT.—Equity will not relieve against a judgment on the ground of usury, unless that matter is put directly in issue; nor against a judgment by default, unless good cause appear for not defending at law.

APPEAL from Lynchburg chancery court. The opinion states the case.

CABELL, J. Benjamin Perkins executed to Peter Toell his negotiable note for five hundred dollars, on which Humphreys, administrator of Toell, brought suit in the superior court of law for the county of Campbell, and Brown became common bail. No defense being made, judgment was rendered against Perkins and Brown for the amount of the note, with interest. Brown filed his bill in the court of chancery for the Lynchburg district, in which he stated that shortly after the institution of the suit, he removed to the county of Nelson, "and taking it for granted that Perkins would attend to the said suit, and on the trial thereof procure evidence of all the credits to which he was entitled, he gave himself no further trouble about the matter;" but that Perkins, although entitled to large credits, failed from the extreme derangement of his affairs, and other circumstances, not specified, to prove the credits, in consequence whereof judgment was rendered, as aforesaid, for the whole amount of the principal of the said note, with interest thereon. He alleges as a fact, which he says he will be able to prove, that Toell was indebted to Perkins for various dealings, in a sum equal or nearly equal to the amount of the note, for none of which had Perkins been paid; that Toell acknowledged in his life-time that there was a very small balance, if any, due on the said note; and moreover, that since the death of Toell, Perkins had paid to his widow, with the knowledge of his administrator, one hundred dollars; which payment was intended to be on account of certain extra interest upon the said note, agreed by the said Perkins to be paid to the said Toell. He prayed an injunction, which was granted.

Humphreys answered, denying all knowledge of the credits claimed, of the payment to Mrs. Toell, and of any agreement to pay usurious interest. Brown filed an amended bill, and without making any new charge, made Perkins a party, calling on him to say, among other things, what excess of interest was

demand and received by the said Toell, of him, the said Perkins.

The only evidence that could in any aspect of the case be relied on as material is that of Nicholas Harrison, who testifies that Toell told him, a short time before his death, that the note in question had been given for money, lent at an interest of two and a half per cent. a month; that the interest had been paid in goods, and that he was then dealing with Perkins, and would endeavor immediately to collect his whole debt, and that about two hundred dollars were then due. The questions are, whether any relief is to be granted, either on account of the alleged usury, or of the credits claimed for Perkins?

1. As to the usury. It is competent to a party to an usurious contract to go into equity for relief, as to the interest, even after a judgment at law, and without assigning any reason for having failed to defend himself at law. But this can be done only on a bill properly framed for the purpose. If the bill in this case had impeached the transaction as usurious in its origin, and had sought relief on that ground, the testimony of Harrison might have been relied on in support of a claim to be exempted from paying any interest whatever. But there is no such allegation in the bill; and therefore the testimony of Harrison as to the usury, relating to a matter not in issue, is irrelevant, and ought to be disregarded.

The only part of the bill that relates to the question of usury, is that which states that since the death of Toell, Perkins had paid his widow, with the knowledge of the administrator, the sum of one hundred dollars for extra interest on the note, agreed by Perkins to be paid to Toell. But this is not stated to have been originally agreed when the note was executed. It may have been a subsequent agreement in consideration of delay of payment, after the note became due; in which case it would not have affected the note, and the legal interest upon it, although if supported by testimony, it might have entitled him to relief for all beyond legal interest. But the allegation, as made in the bill, is denied in the answer, and is not supported by Harrison's testimony, nor any other in the cause.

The appellant was, therefore, rightly dismissed from court, so far as relates to the questions of usury.

2. We will next examine his pretensions on the ground of the credits to which, it is alleged, Perkins was entitled. It may be admitted that, as to these credits, Harrison's testimony is relevant and even satisfactory. But the appellant will,

nevertheless, be entitled to no redress. The bail had a right to make any defense at law which the principal himself might have made. He might have defended himself on the ground of these credits. There is no allegation of a defect of testimony; for even in his bill, he declares his ability to prove them. He ought to have defended himself at law; and as he assigns no good reasons why he did not do so, the door of the court of equity ought not to have been opened to him.

The decree of the chancellor should be affirmed.

CARR and GREEN, JJ., concurred, and the judgment was affirmed.

BROOKE, President, and COALTER, J., absent.

In what cases equity will relieve against contracts that are usurious, although a judgment at law may have been obtained thereon, see *Fanning v. Dunham*, 9 Am. Dec. 283; *Marks v. Morris*, 5 Id. 481; also, as to equitable relief against judgments generally, see *Turpin v. Thomas*, 3 Am. Dec. 615; *Drew v. Clarke*, 5 Id. 698; *Clay v. Fry*, 6 Id. 654; *Poindexter v. Waddy*, 8 Id. 749.

JONES v. MASON.

[5 RANDOLPH, 577.]

LEGACY, ADEMPMENT OF.—Where a legacy is given to a child, and afterwards an advancement is made to such child, the same will be presumed to be in satisfaction of the legacy, but such presumption may be rebutted; and although the thing advanced is not of the same kind as the thing bequeathed, it may be proved that it was the testator's intention that one should be in satisfaction of the other.

APPEAL from Richmond chancery court. The opinion states the case.

Stanard, for appellant.

Johnson, contra.

CARR, J. In the year 1816, Benjamin Jones made his last will, in which he seems to have apportioned his estate with great care and deliberation among his children. They were seven in number; three sons and four daughters. Three of the daughters were married and portioned. The fourth, Martha, with the three sons, Robert, Benjamin and Thomas, were infants. It is to these infants that the bounty of the testator was principally confined. To his sons he gave all his land, each a tract. His slaves, he seems, so far as we may judge, to have meant to

divide equally. At least this was so with the three youngest, Benjamin, Thomas and Martha. To Robert (the eldest, as I take it), he gives his plantation in Brunswick county, including the mill, etc., and thirteen slaves, by name, together with stock, horses, tools, etc.; among the negroes given, are Moses, Harry and Sam. When Robert came of age, his father put him in possession of the plantation as it stood; except that he took from it several slaves, not among those he had by will given his son, and also took away Moses and Sam, two of the slaves in the will; and left Ellick, Aggy and their child, not in the will. Harry, another slave mentioned in the will, was on the manor plantation of the testator when his son was invested with possession. It is stated by the executor in his answer, that the three slaves, Ellick, Aggy and their child, were intended to supply the places of Moses, Harry and Sam; and that though somewhat inferior in value, that difference was more than made up by other property left on the estate, and advanced to Robert; and further, that at the time his portion of the estate was given up to him, it was a full and equal proportion of the testator's estate.

Things remained thus till the death of the testator; when that took place we are not told. He died without altering his will; and this bill is filed by Robert, to recover of the executor the three slaves Moses, Harry and Sam, claiming that Ellick, Aggy and child were not given in substitution of them, but in addition to them; and that he has a right to both.

The executor, by his answer, controverts this claim, contending that when the testator put the plaintiff in possession, he manifested his intention of giving off to him at once his whole portion, by removing from the place all those slaves he did not intend for him, and leaving those he meant to give him; and that by taking away Moses, Harry and Sam, and leaving Aggy, Ellick and child, he proved that he meant these last to stand instead of the former, and not in addition to them.

The case was set down for hearing, by consent, on the bill and answer, and heard the same day. A question was raised at the bar, whether the statements in the answer were to be taken as true; a question of very little moment, in my mind, as to any influence it can have on this cause. I do not consider that the case comes directly within the letter of the rule, that where the plaintiff sets down a cause on bill and answer, he takes the answer as true in all things. There he acts upon his right; here the matter is by consent. But I think it within the reason

of the rule. I have no doubt that this whole proceeding was taken at once, without the regular steps, for the purpose of trying without delay, in a friendly manner, the rights of parties; and that the bill and answer were intended to present the whole case to the court, there being, in truth, no contradiction between them as to facts. The two affidavits are merely as to the amount of the difference in value between the slaves, not as to the fact of difference. I think, then, that the answer must be taken as a part of the case agreed to by the parties; that is, so far as it states facts, and so far as any extrinsic evidence can be looked to.

The great question in the cause is, was the legacy in the will of Moses, Harry and Sam, revoked, adeemed or satisfied (for sometimes one term and sometimes another is used), by the taking these slaves from the son's plantation, when he was put into possession, and giving him Ellick, Aggy and child? This question is important, and I believe, in this state, of the first impression. In the English books there are many cases turning upon it, and the principles which govern it, are considered as well settled. I will cite some of those cases.

Izard v. Hurst, 2 Freem. 224. "The defendant's testator, by his will, gave his four daughters six hundred pounds a-piece, and afterwards married his eldest daughter to the plaintiff, and gave her seven hundred pounds portion. After that he makes a codicil, and gives one hundred pounds a-piece to his unmarried daughters, and thereby ratifies and confirms his will, and dies; and the plaintiff preferred his bill for the legacy of six hundred pounds given to his wife by the will; and the only question was whether the portion given by the testator in his life-time should be intended in satisfaction of the legacy? And held that it should; and agreed to be the constant rule of this court, that where a legacy was given to a child, who afterwards upon marriage, or otherwise, had the like or a greater sum, it should be intended in satisfaction of the legacy, unless the testator should declare his intent to be otherwise."

In *Ellison v. Cookson*, 1 Ves. jun. 100, Lord Thurlow, speaking on this subject, says: The common way of arguing this is to forget entirely the rule of law, namely, that where a legacy is given to a child, it is deemed a portion, and therefore carries with it these qualities; that it is a deliberate distribution among his children of such portions as the testator thinks fit. Crediting him for that deliberation, if he advances in his life that sum which he has adjudged to be the due and proper por-

tion for that child, the presumption of law is that he has satisfied that intent, and consequently that it is no longer a ground for any further demand."

But though it is a presumption of law, it is not that kind of conclusive presumption against which nothing can be said, but a presumption which the law makes upon the general facts liable to be rebutted by evidence; and the kind of evidence for that is any demonstration from the conduct and language of the author of both gifts, that he considered the gift by the will as still a subsisting benefit.

In *Trimmer v. Bayne*, 7 Ves. 508, Lord Eldon says: "The rule is settled that where a parent or person *in loco parentis* gives a legacy as a portion, and afterwards, upon marriage, or any other occasion calling for it, advances in the nature of a portion to that child that will amount to an ademption of the gift by the will, and this court will presume he meant to satisfy the one by the other."

The same doctrine is explicitly laid down in many other cases as the unquestionable doctrine of equity, though some of the judges seem rather disposed to quarrel with the rule: See *Twisden v. Twisden*, 9 Ves. 413; *Hartopp v. Hartopp*, 17 Id. 184; *Ex parte Pye*, 18 Id. 140; Coop. Eq. Cas. 270, and numerous other cases.

This being the established rule, let us see whether our case be within it. That the testator meant to dispose of his whole estate by his will is most apparent. He does, in fact, dispose of it with great deliberation and particularity, giving to each object of his bounty all that he intended such object should enjoy. Living till his eldest son came of age, he determined, as regarded him, to do at once what he had ordained should be done after his death. In the execution of this purpose, he had a full right to change or modify any part of the gift, and no man could say, "Why doest thou?" The plantation which he had devised to the plaintiff had been for some time settled as a quarter, and there were several slaves there more than he intended to give to the plaintiff. When he invested his son with possession of the land, slaves, stock, etc., he sent from that place to his home plantation those slaves he meant to keep himself, and left with his son those he meant to give him. Moses, Harry and Sam, though named in the will, were not left. Moses and Sam were sent from his son's place to his own; and Harry was already there. But he gave to his son three slaves not in the will, Ellick, Aggy, and their child. That these were

given the bill avers and the answer acknowledges; and they have ever since been held, and are still held, by the plaintiff as his property. It is agreed that they are not of equal value, but the answer states that the difference in value was more than made up by other property, and that at the time possession was given to the plaintiff he took a full proportion of the estate. These statements I consider as proper evidence. Now I ask how this proceeding is to be explained. Can we understand it in any other way than that the father was establishing his son, setting him up in the world, giving him his full proportion to manage for himself? Why, in this proceeding, should he withhold three of the negroes which the will had designated for his son? Why send them away from his place and leave three others there? Clearly, in my judgment, because he had changed his mind in this respect, and for some reason determined to keep these slaves himself and give his son others. He might have many reasons for this. These slaves might suit particular purposes, important to him. He might have a particular fancy for them. His will was his law in this matter, for all were his. But if he did not mean to change this part of his gift, if he intended these slaves still for his son, can we conceive why he should not have given them to him when he was setting him out and delivering to him all the rest of his portion?

But it was insisted that the rule as to ademption of legacies could not apply to this case, because it is an essential ingredient in that rule that the thing bequeathed and the thing given must be *ejusdem generis*, and it was affirmed that no case could be produced where a legacy of a specific thing was adjudged to be adeemed by the gift of another specific thing.

We must recollect that this whole class of cases depends upon intention. We imply from a man's acts his meaning. When he gives five hundred pounds to A., his child, by will, and after, on her marriage, advances this same sum of money, its being the same thing in amount and in kind, makes it more apparent that the gift was a consummation of the bequest; that he was performing in his life-time, the duty towards his child, which he had set down in his will to be performed after his death. Every legacy given to a child by a parent is considered a portion for the advancement of such child. In England, from the nature of their property and the situation of society, these portions and legacies are almost always in money. With us, nothing is so usual as to advance children by gifts of slaves. They stand with us instead of money. If a man were to be-

queath ten slaves by name to his daughter, and afterwards, on her marriage, to advance to her those same slaves, no body would deny, I presume, that this was a satisfaction of the legacy. Suppose he were to bequeath to her ten slaves, to be selected by his executor, and after, on her marriage, he were himself to select ten, and advance to her; would any body deny that this was an ademption of the legacy, especially when it was a full child's part, and as much as he could give to any other? Suppose a man were to bequeath to his child ten thousand dollars; and after, were to make to that child a deed for a tract of land, and declare in the deed that it was in satisfaction of the legacy. All will agree that this gift, though not *ejusdem generis*, would adeem the legacy; because it declares the intention; and the power of the owner being plenary, that intention must prevail. It is only a means to discover that intention where it is not expressed, that the rule of *ejusdem generis* is resorted to. A reference to some of the English cases will show that this is the ground of the rule.

Hoskins v. Hoskins, Prec. in Ch. 263. A father gave his son seven hundred and fifty pounds in his will. Afterwards he bought him a cornet's commission, which cost six hundred and fifty pounds. It was decided that this six hundred and fifty pounds should be a satisfaction *pro tanto* for the seven hundred and fifty pounds. If it be said that it was so decreed because it was in proof that the testator intended the six hundred and fifty pounds should be discounted out of the legacy, and meant to have struck so much out of his will, but died before the accounts came from London, I answer, it still shows that intention is everything; *ejusdem generis* nothing. For no one will contend that the commission in the horse was *ejusdem generis* with the seven hundred and fifty pounds.

Chapman v. Salt, 2 Vern. 646. S. devised fifty pounds to Mary, the wife of L. C. Afterwards, the testator gave L. C. a note for fifty pounds, payable on demand. Objected, that the note was to one, the legacy to another. If the wife survived, she would have the legacy, and the executors of the husband the note. But it was proved that the note was intended as a satisfaction of the legacy, and the bill was dismissed; showing still that intention is all.

It is laid down, generally, that a residuary legacy will not adeem a portion due under a settlement, because it is entirely uncertain what that legacy may be. But this rule, like the rest, yields to intention.

Thus in *Rickman v. Morgan*, 1 Bro. C. C. 63; 2 Id. 394; to which I refer principally for the powerful argument of Lord Thurlow, on the subject of the intention of the party.

The last case I shall cite, is *Bengough v. Walker*, 15 Ves. 507, where it is decided, that a bequest of a share in powder works, to be made up in value ten thousand pounds, charged with an annuity of twenty pounds for life, was a satisfaction of a portion of two thousand pounds. This certainly was not *ejusdem generis*; but the rule yielded to clear intention.

In the case before us, I have already stated the various considerations, which tend to show the intention of the father, in the gift of three slaves, Ellick, Aggy and child; that it could only be to substitute them for Moses, Harry and Sam. It might, I think, be very fairly argued, that they are *ejusdem generis*; for they are considered only as property, and they are property of the same kind. But I do not think it necessary to press this point.

Upon the whole, I am clearly of opinion, that the plaintiff has no claim to Moses, Harry and Sam, the legacy being adeemed by the subsequent gift.

The county court certainly were wrong in supposing this a case of election; but, as no election was made and the bill was dismissed, no harm is done.

I rather think it was harsh in the superior court, to give costs in a case of such novelty. What was said by the testator in his last illness, I do not think of any avail. It is too vague and uncertain to rest a decree on.

GREEN, J. Robert B. Jones filed his bill in March, 1821, against Edmund Mason, executor of Benjamin Jones, the father of the complainants, stating that the testator, by his will, dated in July, 1816, devised to him a tract of land and sundry slaves by name (fourteen in number), and amongst them Moses, Harry and Sam; that upon his coming of age, his father put him in possession of the land devised to him, and delivered to him the slaves bequeathed, except the three above named; that at the time of this advancement, the father in addition to the slaves bequeathed, with the exception of the three above specified, advanced him other slaves, Ellick and Aggy and their child, who were far short in value of the slaves Harry, Moses and Sam; that his father always intended to make an equal distribution of his estate amongst his children; that after the publication of the will, and the settlement and advancement of the plaintiff, his father's estate had greatly increased in value, and in his opinion,

the slaves bequeathed to him, with Ellick, Aggy and their child, did not exceed a child's part, and prays that the executor may discover "whether the testator in his last illness, did, when the executor was reading over the clause of bequest to the plaintiff, ask him if the negro man Ellick was not embraced in the said clause; and whether he did not understand, that the testator's extreme indisposition prevented from proceeding to alter his will."

The executor answers, that the plantation devised to the plaintiff was settled as a quarter; and when the plaintiff attained full age, the testator invested him with the possession of the estate as it stood, except in relation to some of the negroes attached to it; that at the time of the investment aforesaid, all the negroes contained in the said legacy with the exception of Harry, who was on the manor plantation of the testator, were on the quarter aforesaid, together with several other negroes; that instead of the testator, who seemed desirous to give off to the complainant his estate at once, sending Harry up there, he, amongst others, brought Moses and Sam to his own house, and left, from among the negroes already on that estate, three other negroes, Ellick, Aggy and their child, which were intended as supplying the places of Moses, Harry and Sam; that this arrangement was, as he believed, so understood by all the parties. He admits that the testator's estate has increased in a greater ratio than the plaintiff's; yet his was, at the time when he was invested with the possession, a full and equal proportion; that he has no doubt there was an inconsiderable difference in the value of the negroes so substituted, and those for whom they were substituted; but that this difference was greatly more than exceeded by other property left on the said estate, and advanced to the plaintiff, and he admits that in the testator's last illness, he asked the questions mentioned by the complainant, and indicated a desire to new model the whole will; but he did not, in that or any other conversation, express the least wish to give to Robert either of the three negroes retained at home, but expressed a wish to give him a particular boy, in lieu of one which Robert had lost among his own.

The will, besides the plantation and the negroes, gave to Robert the stock of cattle, hogs and sheep on the plantation, two riding horses, a black and a bay (called his), one bay mare and colt, one sorrel mare, two beds and furniture, and all the plantation tools on said plantation; and after various other devises and bequests, both specific and pecuniary, he gave the residue of his

estate, real and personal, to be kept together for the support of his younger children and his wife, and to be equally divided between his three younger children, Benjamin, Thomas and Martha.

Two affidavits were taken by consent on the twenty-eighth of February, 1821, proving that Moses and Sam were worth two hundred dollars more than Ellick, Aggy and their child. The bill, answer, will and affidavits were filed together on the sixth day of March, 1821, and the cause immediately heard by consent upon these papers.

A question is made whether, in consequence of this proceeding, the answer must be taken to be true; and I think it must. It was really bringing the cause to hearing on bill and answer. The bill and answer both stated that the three negroes bequeathed, and not delivered, to the legatee, were of more value than the three delivered, which were not bequeathed; and the only purpose of the affidavits was, not to contradict the bill or answer, but to supply a defect in both by ascertaining the *quantum* of difference in the values of these slaves.

Upon this case, both the courts below decreed that the plaintiff was bound, and entitled to elect whether to take the three slaves bequeathed, but not delivered, to him, or the three delivered, but not bequeathed, to him, but could not take them all. In this respect the decrees are clearly erroneous. If Ellick and Aggy and their child were not given, so as to vest a title in the plaintiff, then the transaction could not amount to an ademption of the legacy of the three not delivered; and in that case he would be entitled to the slaves bequeathed, and the court could not make it a condition upon which to give relief that he should deliver to the executor those to which he had no title and held wrongfully; and which the executor might have at any time recovered by an action at law. Specific property can not in any case be set off against specific property in a court of equity. If, on the other hand, Ellick, Aggy and their child were given by the testator to the plaintiff, as both the bill and answer virtually affirm, and, therefore, must be taken for true, then it is either an ademption of the legacy as to Moses, Harry and Sam, or it is not. If it is, the will is annihilated as to them; and is as if it did not contain their names. If not, then he has a right to them under the will, and to the others under the gift. He would not, in that case, claim under and against the will; which is the only case in which a party claiming under a will can be put to his election.

Before I proceed to examine the effect of the facts admitted in this case, it will be proper to ascertain the general rules which have been well settled, as applicable to cases like this. The statute now in force, passed in 1785, c. 61, sec. 7, 12 Hen. Stat. at Large, 141, is the same in effect, but in an abridged form, as that of 1748, c. 5, sec. 12, which was taken *verbatim* from the twenty-second section of the British statute of frauds of the 29 ch. 2, and provides, that "no will in writing, or any devise therein of chattels, shall be revoked by a subsequent will, codicil, or declaration, unless the same be in writing." The object of this provision was to prohibit the revocation, wholly or partially, of a written will, by parol declarations or nuncupative dispositions, which might have been done before the statute of frauds, even as to wills of lands. The statute of frauds, however, has never been held to prohibit the revocation either of wills of land or of personalty, by implications founded upon events subsequent to the making of the will, although the prohibition by the statute as to the revocation of a will of lands is much stronger than that as to the revocation of a will of personalty; in respect to lands, the statute declaring that no will shall be revoked in whole or in part, but by another will in writing, or by burning, canceling, tearing or obliterating; and in respect to personalty, declaring that no will shall be revoked, in whole or in part, by another will, codicil or declaration, unless it be in writing, leaving all other modes of revocation to operate as at common law. Thus in England the subsequent marriage and birth of a child was an implied revocation of the will, both as to real and personal property; as it was with us (*Wilcox v. Rootes*, 1 Wash. 140) until the first of January, 1787, when the act of 1785, c. 61, sec. 3, took effect, by which it is provided that a last will and testament made when the testator had no child living wherein any child he might have is not provided for or mentioned, if at the time of his death he leave a child, or leave his wife *enceinte* of a child, which shall be born, shall have no effect during the life of such after-born child, and shall be void, unless the child die without having been married before he or she shall have attained the age of twenty-one years.

As, notwithstanding the statute, a revocation *in toto* might be implied from facts afterwards occurring, so a partial revocation as to any particular legacy might be implied from subsequent facts and the acts of the testator. Thus if a testator gave to his daughter five hundred pounds by his will, and afterwards

on her marriage advanced the five hundred pounds to her, this would be an implied revocation of that particular legacy, upon a presumption of law that it was intended by the testator as a satisfaction and ademption of the legacy. But this presumption must be founded solely upon the qualities and circumstances of the fact, without regard to the declarations of the testator; for if the circumstances and qualities of the act were not of themselves sufficient to justify the presumption, then to admit the declarations of the testator to be used to supply the defect of the fact, in order to raise the presumption, would be directly against the terms of the statute. But if the fact itself be sufficient to raise the presumption, the evidence of the declarations of the testator are admissible to rebut the presumption, and to show that he did not intend, by the act in question, to adeem the legacy, as parol evidence is in all other cases admitted to repel a presumption. These principles are well explained in *Ellison v. Cookson*, 1 Ves. jun. 100; *Trimmer v. Bayne*, 7 Id. 508; *Hartopp v. Hartopp*, 17 Id. 184. And in like manner a particular legacy may, by implication, be adeemed in part as well as *in toto*, if the act of the testator be such as to show that a subsequent advancement was intended as a satisfaction of the legacy in part.

The ground upon which the presumption of law in such cases is founded is this: Legacies to a child are in general given, in pursuance of the natural obligation of the parent, as a provision for the advancement and establishment of the child in life, and if, in the life-time of the father, the child is settled in life by marriage, or otherwise separated from the family of the parent, and commences the business of his life, and the parent makes him substantial advancements in proportion to his ability and pre-determination, as expressed in his will, he is presumed to have intended to give now what, when he made his will, he intended to give at his death, in whole or in part, according to the amount and circumstances of the advancement, rather than to have intended to abandon and violate the deliberate purpose expressed in his will, as to the distribution of his property amongst the members of his family, by giving to the child advanced an undue proportion of his estate, and more than he intended by his will, both the legacy and the advancement.

The testator in the case at bar left a wife and three sons, all under age when he made his will, and four daughters, of whom three were married, and had been in part advanced, and the other was an infant. To the daughters and their families, he gave

money and negroes. To the sons, he gave all his land, consisting of two tracts, the quarter which he devised with the stock, etc., upon it, to Robert, the complainant, and that where he resided, which he divided between his two younger sons. A part of the negroes at the quarter, he bequeathed to Robert by name, and gave the balance, except those specifically bequeathed, to the families of his married daughters, together with all his undisposed of residuum, consisting of stocks, etc., to his two youngest sons and unmarried daughter, to be kept together and worked on his home plantation, for the support of his wife and three youngest children; and when Benjamin came of age or married, he was to have his part of the land, and one third of the residuary negroes, stocks, etc., and the balance to be kept on that part of the land, and worked for the support of the widow and two youngest children, until Martha came of age or married, when she was to have the money given to her, and a moiety of the remainder of the negroes; and Thomas was to have the residue of the land, negroes, etc., charged with the support of the widow.

When Robert came of age, the testator put him in possession, as his own, of all that he had devised and bequeathed to him, except the negroes in question; two of which he withdrew from the plantation given to Robert, to which they had belonged, and instead of these three negroes, he advanced to Robert three other negroes which lived on that plantation, and other articles not bequeathed to him by the will; which, with the value of the three negroes not bequeathed, exceeded in value the three negroes bequeathed and not advanced or delivered to Robert; and this was a full and equal proportion of the testator's estate. What the other property not bequeathed given to Robert, besides the negroes not bequeathed, consisted of is not stated; but it was probably provision to support the plantation until Robert could make a crop, which was not provided for him by the will.

These are the facts and circumstances on which we are to say whether a legal presumption arises that the testator, by this gift to Robert when he came of age, intended to satisfy and adeem the legacy in full, and whether the bequest is revoked by implication or not.

I can not resist the conviction that such was the intention of the testator. The circumstances that when his son came of age, he put him immediately in the possession of all the property devised and bequeathed to him, except the three negroes, and gave him three other negroes not bequeathed, of less value in-

deed than the others, but compensated in other property; the separating at that precise time the two negroes bequeathed from the rest, and removing them from the plantation, where they had been resident and employed, as well as the separating and removing of all the other negroes not given, who were settled on the same plantation, indicated clearly an intention to separate this son finally from the family of the testator, to set him up in life, and to advance him fully to the extent intended by the father. He was doing in his life-time in effect all he had intended to do for this son by his will; and the substitution of three other negroes for the three taken away, and compensating the son for the difference in value with other property not bequeathed, fortifies this conclusion.

This conclusion was resisted, in the argument of the cause, by the suggestion that the negroes given by the testator were not of equal value with those given by the will and withheld. This objection is unfounded; for that difference in value was made up with other property given with them. The only real objection insisted on is, that no case has been decided in which a gift of a specific thing has been adjudged to adeem a legacy of another specific thing; and that the rule in respect to satisfaction and adoptions, presumed from circumstances, is, that the thing given and the thing bequeathed should be *ejusdem generis*.

In cases of this class, the question is only as to the intention of the testator, to be inferred from his acts and not from his expressed will. It is impossible to prescribe any technical and inflexible rules governing the result of such an inquiry. Each case must depend upon its own circumstances. The rule of *ejusdem generis* is of some use in elucidating the inquiry into intention. If either the specific thing given by the will, or given by the testator in his life, should appear not to be intended as a portion, or as a substantial part of the intended advancement for the establishment of the child in life, and intended as an additional manifestation of kindness, the gift of one would not adeem the other; and in England, hardly any other case of the bequest and gift of specific articles can occur. There the universal practice is to provide the portions or fortunes of younger children in money, either by will or settlement; and the obligation, when resulting from a settlement or a promise made by will, is generally satisfied by a bequest of money, or a gift of money in the life-time of the party. With us, the advancement of children is most frequently in negroes; and a bequest or gift of negroes is generally made as an ad-

vancement for the better establishing the child in life; and here, a gift of negroes, in lieu of other negroes, may be considered as an ademption of the legacy, if other circumstances show that such was the intention of the testator. These are, to all the purposes of the argument, *ejusdem generis*.

There are also cases in the English books in which this rule has not been strictly adhered to. A few examples of the application of the rule, and in which it has been disregarded, will illustrate the reason and foundation of the rule.

In the case of *Grave v. The Earl of Salisbury*, 1 Bro. C. C. 425, it was held that the grant of a lease for ninety-nine years at a rent of forty pounds per annum, which was worth one hundred and eighty pounds per annum, and money paid for repairs, and the standing crop, the commissioner estimating the value of the whole at four thousand four hundred pounds, was not an ademption *pro tanto* of a legacy of ten thousand pounds. The chancellor says upon this rule of *ejusdem generis*: "In the present case, it would be presuming that Lord Salisbury had the idea of portion in his mind, when he was giving a thing not *ejusdem generis*. The true ground of this case is that the whole gift of the lease, repairs and crop, being one and the same transaction, was either intended as an advancement and ademption of the legacy *pro tanto*, or the testator had no such intention. If he had intended it as an ademption *pro tanto*, he would have fixed a value upon it, and not have left it to be afterwards ascertained by estimate and conjecture: See *Bengough v. Walker*, 15 Ves. 507.

In *Holmes v. Holmes*, 1 Bro. C. C. 555, it was held by the lords commissioners that a legacy to a son of five hundred pounds was not adeemed by the father's taking him into partnership with him, in a trade which they were to have a capital of three thousand pounds to be brought in equally. The father brought in the whole capital, and had said that he meant to give half the stock to his son, and so it was understood in the family, and one witness said he had given him half the stock. This was not held to be a satisfaction, not being *ejusdem generis*, and that it must have been the testator's intention that he should have both.

It has also been held that the bequest of a residue is not a satisfaction of a portion for which the father was bound, as it consists of choses in action, and is uncertain as to its amount. In such a case, where the father is under a legal obligation to pay a portion, the provision by will must be equal to the portion, and subject

to no condition or uncertainty; a rule which is not strictly applied to a case of the ademption of a legacy by a gift. For both the legacy and the gift are purely voluntary, and the testator may substitute, if he choose, one thing for another, or a lesser for a greater value.

The only inquiry is, whether in fact, the circumstances were such as to prove that intention. The cases above noticed proceeded upon intention; and the difference in the things given and bequeathed, and the uncertainty of the residue both as to the amount and time of payment were calculated to induce a belief that the testator had no intention to adeem the legacy, or satisfy the portion. Other cases have occurred in which the rule of *ejusdem generis* has given way to the intention of the testator inferred from the other circumstances of the case, and a residue has been considered as a satisfaction; as in *Hoskins v. Hoskins*, Prec. in Ch. 263, the father bequeathed to his younger son seven hundred and fifty pounds, and afterwards bought him a cornet's commission for six hundred and fifty pounds; and this was held to be a revocation of the legacy *pro tanto*. In this case it was proved that the testator intended to alter his will, and deduct this from the legacey, but died before he did it. This evidence probably had no influence on the decision; for it was clearly inadmissible, the case occurring after the statute of frauds.

In *Bengough v. Walker*, 15 Ves. 507, it was held that a portion of two thousand pounds, for which the father was bound, was satisfied by a legacy of a share in powder works, charged by the will with the payment of an annuity of twenty pounds, which the testator directed should be made up in money to the value of ten thousand pounds. The value of the share did not appear, and might have been nine thousand five hundred pounds. The value of the legacy as fixed by the testator ascertained his intention; and in *Rickman v. Morgan*, 2 Bro. C. C. 394, it was held that a residue was a satisfaction of a portion of eight thousand pounds; the intention of the testator being inferred from the *quantum* of the residue.

It seems, therefore, that the rule of *ejusdem generis* is not conclusive that the testator did not intend to adeem a legacy by giving another thing in his life-time; but it is one, and in England a strong circumstance to prevent the presumption of ademption or satisfaction, yet capable of being overruled by other circumstances; and in the case at bar I think the manner and circumstances of the gift show that the intent of the testa-

tor was to give at once to the plaintiff all he intended to give him, and to substitute the three negroes and other property given, for the three negroes bequeathed and not given.

The declarations of the testator are admissible evidence to rebut this presumption. But they were not such as to impair the legal presumption in this case. The inquiry of the testator, when the clause in the will giving the negroes to the plaintiff was read, whether Ellick and Aggy were not in it, does not prove that he wished to insert their names in addition to the others; but might have been to provide, as he had done in respect to others of his children, and, as is very usual, a clause confirming the title to what he had already given him. It is not necessary to examine the other suggestions of the executor's answer in respect to the testator's intentions.

This case being one of the first impression with us, and presenting a question of some novelty and difficulty, I think the county court were right in not decreeing costs to either party, but wrong in giving the plaintiff an election, which, however, can now do no injury to the appellee; and that the decree of the chancery court should be reversed with costs, and that of the county court affirmed, with costs of the chancery court to the appellee.

CABELL, J., concurred, and the decree was reversed.

BROOKE, President, and COALTER, J., absent.

See *Walton v. Walton*, 11 Am. Dec. 456.

ANDERSON v. COMMONWEALTH.

[5 RANDOLPH, 627.]

COMMON LAW—INDICTABLE OFFENSES AT.—Adultery, fornication, and the like, were not indictable at the common law.

OFFENSES CONTRA BONOS MORES are punished by the courts, but the jurisdiction in such cases should not be extended beyond the limit established by the adjudicated cases.

Writ of error to a judgment sentencing the plaintiff in error to imprisonment. The indictment charged the plaintiff in error with enticing and carrying away from the custody of her mother one Elizabeth Hargrove, of the age of sixteen years and two months, for the purpose of prostituting and carnally knowing her; and a second count charged him with having on a day certain, carnally known the said Elizabeth.

By Court, DADE, J. The question is, whether the offense of which the plaintiff has been convicted, and had judgment, is a misdemeanor, punishable by indictment at the common law.

The class of misdemeanors within which it is insisted this offense is comprehended, is that of offenses *contra bonos mores*, over which the court of king's bench in England, and the superior courts of law of this commonwealth, have always claimed to have jurisdiction. It is admitted that before the statute of *circumspecte agatis*, 13 Edward I, the court of king's bench did, on this principle, punish the offenses of incontinency, and that by the statute the jurisdiction was transferred to the ecclesiastical courts. It may be well doubted whether the king's bench before that statute, or the courts christian since, looked beyond the simple fact of incontinence, as that offense is at present contemplated and punished by our own acts of assembly. In other words, whether they looked beyond the mere offense of incontinence as consisting in the single act of cohabitation between persons of different sexes, without the rites of marriage, not varied by any fraud, deception or inveiglement, which may have been practiced by the man. But, after the statute of *circumspecte agatis*, the court of king's bench did not exercise jurisdiction in punishing the mere act of incontinence. It, however, retained its general power of punishing offenses *contra bonos mores*, and it is presumed might have punished an offense of incontinence combined with circumstances, which, beyond the mere criminality of the simple fact, were calculated to make it injurious to society; as in case of incontinence in a street or highway. But in such cases the jurisdiction would not spring from the criminal character of the simple fact, but from its publicity; as there are many cases where an act, which is not criminal in private, becomes penal by the publicity which attends its perpetration. The act of Sir Charles Sedley, in running naked through the streets, derived its whole criminality from its publicity. It is not, therefore, in this case, allowable to connect the criminality of the mere act of incontinence, which as such is punishable in a certain mode prescribed by the statute, with the particular circumstances of fraud and deception, and the special injury to the female, so as to make the supposed common law offense, as the courts might entertain it in England, since the statute of *circumspecte agatis*, derives support, or even acquire being from the statutory offense.

If the statutory misdemeanor of simple incontinence is to be punished, it must be according to the statute. If there be

other circumstances in the case which entitle the common law courts to jurisdiction, those circumstances must of themselves constitute a misdemeanor. By these principles the only two reported cases in the English books are to be tested. The case of *The King v. Lord Grey and others*, 9 State Trials (Cobbet's edition), p. 127, was that of an information alleging a conspiracy to take away and debauch a maiden over the age of sixteen and under twenty-one, and accomplishment of the act by those means. This conspiracy is emphatically charged in the information; and as it was to do a wrongful act, for which certainly, if done, an action lay to the father of the maid, the conspiracy if proved clearly amounted to a common law misdemeanor. So in the case of *Sir Francis Blake Delaval and others*, 3 Burr. 1432, which was "a motion for an information against the defendants for a conspiracy to put a young girl into the hands of a gentleman of rank and fortune, for the purpose of prostitution," although Lord Mansfield, in allowing the motion, intimates an opinion that the court of king's bench might have jurisdiction of the case, as one *contra bonos mores*, yet he decides it on the ground that there was in that case "a conspiracy and confederacy," which, says he, "are clearly and indisputably within the proper jurisdiction of this court;" without doubt in these cases, the court having jurisdiction of them on undeniable common law principles, the punishment in case of conviction might well be aggravated by the baseness, perfidy or malignity which was the motive and end of the conspiracy. In like manner, as in trespass, circumstances may aggravate the damages, which would not of themselves alone support the action. But clearly neither of these cases does maintain the position that, as a common law misdemeanor, an indictment or information will lie, either for simple incontinence or for incontinence produced by means of deception, inveiglement or enticement; in other words, by seduction.

It is too late now to assume jurisdiction over a new class of cases, under the idea of their being *contra bonos mores*. We must consider the practice of the English courts, from which we derive the principle as having settled in the course of many centuries the true limits and proper subjects of this principle. If we are to disregard these landmarks, and take up any case which may arise under this principle, as *res integra*, then might it be extended to cases which none has yet thought of as penal. A case of slander may display as much baseness and malignity of purpose, as much falsehood in its perpetration, as ruinous effects in its consequences, and as pernicious an example in its

dissemination, as this case of seduction. And yet none would think of prosecuting it criminally. It is true that if something peculiar in our situation had given rise to a class of cases *contra bonos mores*, as in regard to our slaves, which could not have existed in England, we might be justified in applying the rule in the absence of all precedent. But in relation to seduction, no such supposition can be made, as we know from the books of reports that many such cases have occurred there. And we even see that in two cases it was in fact the prominent feature, and yet the jurisdiction in one of them was made to hang on another hinge; and in the other, which was never decided, was certainly fortified by the allegation and proof of a common law misdemeanor.

From these premises it would seem to be proper to infer that since the statute of *circumspecte agatis*, in England the common law courts have never taken jurisdiction of the mere offense of incontinence, nor of any offense of incontinence combined with other reprehensible circumstances, not in themselves importing a common law misdemeanor; that in this country the legislature has taken up the subject of simple fornication and adultery, and has defined a precise mode of proof and a fixed and certain punishment; that there is no reason to believe that these statutes are cumulative, but that they occupy the whole ground, and that, as in England, the offense being merely spiritual, is not, under any circumstances, allowed to be the foundation of a criminal prosecution in the courts of common law; so here, by parity of reasoning, the offense being entirely statutory, it shall not be converted into the foundation of a common law misdemeanor.

If these premises and deduction be true, we must throw out of this case the statutory criminality of the mere act of incontinence, and then we can not support the indictment, unless the other circumstances amount to a common law misdemeanor. If they had made out a case of conspiracy, that desideratum would have been supplied. But it is not found in the artifices and contrivances which may have been used in alluring the female from the path of virtue, and the home of her parent.

For these reasons the court is of opinion that the judgment of the superior court of Chesterfield be reversed, and this court proceeding to give such judgment as the said superior court ought to have rendered. It is further considered that of the offense of which the said Samuel Anderson hath been indicted and convicted, he be acquitted and discharged, and that he go thereof without day.

SMOCK v. DADE.

[3 RANDOLPH, 639.]

SUPERSEDEAS BOND.—The penalty of such a bond is fixed by the judge granting it.

EXECUTION ISSUED ON SATISFIED JUDGMENT MAY BE QUASHED ON MOTION.

—A motion to quash an execution issued on a satisfied judgment is the proper proceeding in place of an *audita querela*, which is now an obsolete remedy; and on such a motion the court may order questions of fact to be tried by a jury.

ATTORNEY AT LAW—POWER TO BIND CLIENT AFTER JUDGMENT.—An attorney has no power to receive in satisfaction of his client's judgment a bond from the judgment-debtor.

DEFENDANT moved to quash an execution issued October 10, 1823, on a judgment against him in favor of plaintiff, on the ground that on a former execution the judgment had been satisfied; and offered in support of the motion the former execution, one which was indorsed by the sheriff "not executed, by order of plaintiff's attorney;" and also introduced the receipt of one Banks, the attorney for plaintiff, as follows: "Received twenty-fifth of November, 1822, from Col. Laurence T. Dade one hundred and fifty-four dollars and seventy cents in money; also the bond of William Quarles for one hundred and seventy dollars and thirty-nine cents, payable in four months, and a draft on Anthony Buck for three hundred dollars, at ten days' sight, which, when paid, will be in full of the executions of James Smock and Peter Smock against him in Orange county court." The draft was paid, but no evidence was offered to show the payment of the bond. The court quashed the writ issued October 10, 1823.

Stanard, for the plaintiff. The relief claimed should have been sought by *audita querela* or injunction: 1 Salk. 264; 1 Ld. Raym. 439; *Beebe v. Bank of N. Y.*, 1 Johns. 531 [3 Am. Dec. 353]. And that Banks had no power to bind his client by taking a bond in satisfaction of his client's judgment.

Johnson, contra. The writ of *audita querela* has become obsolete, and in modern practice, the motion has taken its place: 1 Bac. Abr. 311, *Audita Querela*, B; *Lester v. Mundell*, 1 Bos. & Pull. 427; *Anonymous*, 1 Salk. 93; *Burke v. Hunt*, 17 Johns. 484. That defendant was entitled to a jury trial: *Burke v. Levy*, 1 Rand. 1. And that Banks had the power to receive the money, and discharge the execution for his client: 1 Com. Dig. 157, 158, B. 9, B. 10; *Hudson v. Johnson*, 1 Wash. 10; *Branch v. Burnley*, 1 Call, 147.

By Court, SUMMERS, J. It is conceded by the counsel for the defendant, and the court concur with him in the opinion, that the writ of supersedeas was properly allowed, and that the law respecting an appeal by the plaintiff or demandant has no relation to writs of error and supersedeas. On examining the question whether the remedy sought in this case should have been an *audita querela* or injunction, and not by motion, we are satisfied, as well from the uniform practice in Virginia as from the modern decisions in England, that the more summary and less expensive mode of proceeding by motion was proper, and that relief may be given in this way in all cases where by the ancient practice the party would be entitled to an *audita querela*.

When the claim of the party to relief depends on matters of fact, the court may in its discretion cause them to be submitted to a jury, and such course is particularly proper where the evidence is contradictory, or where it may authorize conflicting inferences, and either of the parties are desirous of referring it to that forum. But the case before us does not, in our opinion, fall within this rule, nor does the record disclose any objection by the parties to the mode of trial adopted. The authority of the attorney to receive payment of the debt which he is employed to recover we think well settled; but that authority, in our opinion, does not extend to its commutation without the assent of the client. In relation to Quarles' bond, we regard Banks as the attorney of Dade, not of Smock. On giving an acquittance or receipt for the money he must have represented the former, not the latter. It was a new engagement in which all his authority was derived from Dade; to him he must have looked for compensation, and to him he was accountable. To extend the authority of the attorney beyond this limit, without a general discretionary power from the party employing him, would carry the responsibility of the first client into transactions far beyond the first engagement, and which might be induced solely with a view to the profit of the attorney, or the accommodation of the debtor.

If, however, the receipt set out in the record had been the act of Smock himself, it would not, in our opinion, have authorized the quashing of the execution without further proof of the receipt of the money, as that paper imports that the bond of Quarles was taken as a security, not as a payment of the debt. As the money actually paid to Banks by Dade, and by Buck on Dade's order, did not amount to a full satisfaction of the judgments on account of which those payments were made,

the execution ought not to have been quashed, although it would have been entirely proper if such motion had been submitted for the court to have entered a satisfaction of the judgments to the extent of those payments.

The following is to be entered as the judgment of the court: 1. The law respecting an appeal by the plaintiff or demandant does not apply to a writ of error or supersedeas, and, therefore, the penalty of the bond was properly directed by the judge on awarding the writ of supersedeas in this case; 2. The law did not authorize the county court to quash the execution on the evidence before it; 3. The superior court of law ought to reverse the judgment of the county court, and proceeding to give such judgment as the county court ought to have rendered, to adjudge that the plaintiff below take nothing by his motion, etc.

As to power of an attorney after judgment, see *Brackett v. Norton*, 10 Am. Dec. 179; *Head v. Gervais*, 12 Id. 577.

PRENTIS v. COMMONWEALTH.

[5 RANDOLPH, 697.]

PRIVILEGE FROM ARREST.—Courts do not notice *ex officio* the privilege granted legislators, exempting them from arrest and service of civil process. Advantage must be taken of the same at the proper time and in the proper way or it will be deemed waived.

ADJOURNED case from the superior court of law of Henrico county. The opinion states the case.

Scott, for plaintiff.

Robertson, attorney-general, for the commonwealth.

SUMMERS, J. On the twenty-sixth of February, 1827, the grand jury impaneled before the hustings court of the city of Richmond, presented the plaintiff in error, by the name and description of Henry L. Prentis, of the legislature, for unlawful gaming at a place called the Profile House, in the said city, at a game played with cards called faro. On this presentment a summons issued, and was returned by the sergeant, "executed on the eighth of March, 1827." At the March term of the hustings court (twenty-ninth of the month) the plaintiff in error was called, but not appearing, judgment was entered against him for twenty dollars, the fine imposed by law, and the costs of the prosecution. On the twenty-seventh of June,

1827, he presented a petition to the hustings court, setting out his election to the house of delegates in April, 1826, his attendance as a member of that body from the first Monday in December following until the adjournment of the legislature on the ninth of March, 1827, and the continuance of his privilege whilst returning home, a distance of four hundred and twenty miles, alleging his exemption from all process and arrest, except for treason, felony or breach of the peace during the continuance of his privilege; that by operation of law all process and other proceedings against him stood suspended for the same period; that the proceedings had in the hustings court were in violation of his privilege as a member of the general assembly, and praying that a writ of error *coram vobis* might be awarded in order that the error complained of might be corrected. On consideration by the hustings court, this petition was rejected and an exception taken, making it part of the record. On the tenth of July, 1827, a writ of error was allowed by the superior court of law of Henrico county to the judgment of the hustings court, overruling the application for a writ of error *coram vobis*, and the cause coming on for trial in that court, by consent of the plaintiff and the attorney of the commonwealth, the following questions were adjourned to this court for its decision:

1. Ought the said writ of error *coram vobis* to have been awarded by the hustings court, according to the petition of the plaintiff?

2. Ought the superior court of law to reverse either or both of the judgments of the court of hustings in the record mentioned, and if so, what further proceedings ought to be had thereon?

3. Ought the writ of error awarded by the superior court of law to be quashed?

If the plaintiff is entitled to a reversal of the judgment pronounced against him by the hustings court, we have no doubt of the writ of error *coram vobis* being the proper remedy. This brings us to the more immediate questions submitted to our consideration.

It is important that the administration of the government be not interrupted or delayed by the embarrassments arising from the private affairs of those who are called into public service, and we have, therefore, examined with care the decisions which have been made giving effect to exemptions of the character now claimed, and ascertaining the time and manner in which

such exemptions must be insisted on. From this examination we are satisfied that the courts may not *ex officio* take notice of the existence of the privilege. It results from its nature and character that it may be waived, and therefore ought to be claimed whenever relied on.

The judicial history of this question does not furnish an example of the allowance of the privilege, but upon plea or upon motion, tendered or made, at the period proper for the consideration thereof, by the court whose proceedings are sought to be abated or suspended. It is not an incapacity like infancy and coverture, where consent can not give jurisdiction, and where the irregular exercise of it is void *ab initio*. It is urged, with some force, that the same embarrassments may be produced by requiring a member to allege and prove his privilege during its continuance, that would result from the trial of the cause in chief. We think not. The proof of the facts upon which it rests are easy of attainment, because they are few, and may be adduced, as well in the absence, as in the presence of the party; but if it were otherwise, we think it not the province of the courts to extend the law of privilege beyond the limits heretofore prescribed to it by judicial decisions, which the legislature must have had in view at the period of the enactments on the subject, and which are unaffected by any of the provisions of the statute. Upon the whole matter, we are of opinion that the court of hustings was not bound to take notice of the privilege of the plaintiff, and that his failure to claim the exemption to which it entitled him, until after judgment, was a waiver thereof.

In this opinion, BROOKENBROUGH, DADÉ and FIELD, JJ., do not concur.

The following is to be entered as the judgment of the court:

This court is of opinion, and doth decide, that the writ of error *coram vobis* ought not to have been awarded by the hustings court, on the petition of the plaintiff, which is ordered to be certified.

SEMPLE, J., absent.

PRIVILEGE OF LEGISLATORS.—Provisions exempting members of the legislature from arrest, and from the service of civil process, while in attendance at the seat of government during sessions of the legislature, are found in nearly all the state constitutions, and in many of the states this privilege is extended to members while traveling to and from the place where the legislature is held: Alabama Const., art. IV, sec. 14; Arkansas Const., art. V, sec. 12; Michigan Const., art. IV., sec. 7; Missouri Const., art. IV, sec. 16; Missis-

issippi Const., art. IV, sec. 19; Nebraska Const., art. XI, sec. 16; California Const., art. IV, sec. 11. These exemptions are also extended to members of Congress by the constitution of the United States, art. I, sec. 6. The privileges so secured, protect legislators from arrest by *capias*, as well as from the service of civil process, *cundo, morando et redeundo*. The exemptions mentioned were secured to members of the English parliament at an early date, not only protecting them from arrest and from the service of civil process, but absolutely prohibiting the institution of a suit against a member during the continuance of the privilege: See opinion of Erskine, J., in *Cassidy v. Stuart*, 2 Man. & G. 437; S. C., 40 Eng. Com. Law, 680. The stringency of this rule was modified, however, by the statutes of 12 and 13 W. III, c. 3, which allowed suit to be commenced against members of parliament, notwithstanding they were actually engaged in the service of the public; but providing that nothing further should be done in the suit until the privilege ceased: *Cassidy v. Stuart, supra*.

This doctrine of privilege is not peculiar to the common law of England, however, nor does the same exist only when secured by constitutional or legislative provisions; but it is inseparably connected with the fundamental maxim in all free governments, that where the public exigency renders it necessary for the common preservation, private right shall yield to public good. These privileges are granted that the administration of the affairs of the government may not be interrupted or damaged by circumstances arising from the private affairs of those who are called into the public service, and as a necessary consequence of this principle, it belongs to every body, constitutionally assembled for legislative purposes. Although the right of legislators to these exemptions is unquestionable, yet this right is personal to each member, and must be asserted at the proper time, and in the proper manner, or it will be considered as waived. The rule, as stated in the principal case, "that courts do not *ex officio* notice the existence of the privilege" granted to members of the legislature is undoubtedly correct and well sustained by authority: *Holiday v. Pitt*, 2 Strange, 985; *McPherson v. Nesmith*, 3 Gratt. 241; *Lyell v. Goodwin*, 4 McLean, 29; *Gyer's Lessee v. Irwin*, 4 Dall. 107; *Chase v. Fish*, 16 Ma. 136. *Gyer's Lessee v. Irwin*, was an action of ejectment in which the defendant, by his attorney, confessed judgment, and on motion to set the same aside, on the ground that at the time the judgment was entered, the defendant was a member of the general assembly and privileged from the necessity of attending to his private suits, the court said: "A member of the general assembly is undoubtedly privileged from arrest, summons, citation, or other civil process, during his attendance on the public business confided to him. And we think that upon principle his suits can not be forced to a trial and decision while the session of the legislature continues. But every privileged person must, at a proper time and in a proper manner, claim the benefit of his privilege. The judges are not bound to notice a right of privilege, nor to grant it without a claim. In the present instance, neither the defendant nor his attorney suggested the privilege as an objection to the trial of the cause; and this amounts to a waiver, by which the party is forever concluded." In *McPherson v. Nesmith*, 3 Gratt. 241, on a motion to set aside a judgment entered against the defendant, on the ground that he was a member of the legislature at the time he was served with the summons in the case. Baldwin, J., states the rule with his usual accuracy. He says: "In the present case it appears that the defendant in the action was privileged as a member of the legislature at the time of the issuing of the writ and the service thereof upon him, and continued so privileged until after the office-

judgment was rendered, but not at the next ensuing term, when he moved the court to correct the proceeding in the office, and remand the cause to the rules. It can not be doubted that the arrest or service of the process, and the consequent proceedings in the office, were illegal, and that the defendant had a right to object to them as a violation of his privilege; and the only question is whether he has done so at a proper time and in a proper manner. The defendant could at no time have pleaded his privilege in abatement of the writ, because the protection given by the statute is not against being sued, but against being arrested or served with process. He was not in actual custody, bail not having been required, and of course a motion to discharge him from confinement would not have been appropriate. He had no defense in bar or abatement of the action, and if he had pleaded his privilege at the rules, the substance of his plea would have been a mere objection to the regularity of the proceedings there, to wit, that he had been unlawfully arrested, and the clerk could not lawfully make that arrest the foundation of an office-judgment; nor was it competent for the clerk to vacate the service of the writ and award new process in the action. But the court had full power over the whole subject, being authorized by the seventy-seventh section of the act regulating proceedings in civil suits, 1 Rev. Code, 508, to control and correct, on motion, all proceedings in the office during the preceding vacation, and make any proper order concerning the same; and the court erred in refusing to exercise that power, as stated in the bill of exceptions."

There seems to be some uncertainty, as to the proper manner for a person to avail himself of the privileges mentioned, but all the authorities agree that it may be by motion to quash the writ, or to set aside the proceedings taken, while the exemptions exist: *Holiday v. Pitt*, 2 Strange, 985; *Lyell v. Goodwin*, 4 McLean, 29; *Chase v. Fish*, 16 Me. 135. The latter case was an action on a bond, duress being pleaded as a defense. It appeared that an officer, having an execution against Fish, in which he was commanded to arrest his body, arrested Fish, who was at the time a senator of the state of Maine. Fish, instead of claiming his privilege, went to jail, and was released on giving the bond in suit. Weston, C. J., in delivering the opinion of the court, that the bond was not void for duress, said: "If he was entitled to the immunity claimed, there are legal modes, by which his privilege might be vindicated. It might have been done by order of a court of competent jurisdiction, or by a judge on *habeas corpus*, and possibly under the authority of the body, of which he was a member." See *Washburn v. Phelps*, 24 Vt. 506, where it was held that giving bail was not a waiver of the privilege from arrest.

OFFICERS ARE BOUND to execute writs although the persons against whom they are directed, are privileged from arrest, and an officer who acts in accordance with his precept is not a trespasser although the party arrested is privileged: *Carle v. Delesdemier*, 13 Me. 363; *Tarlton v. Fisher*, Doug. 671; *Sperry v. Willard*, 1 Wend. 32; *Secor v. Bell*, 18 Johns. 52; *Chase v. Fish*, 16 Me. 132. In *Ray v. Hogeboom*, 12 Johns. 422, it was held, that although an officer was not bound to take notice of the privilege of the party, yet it was a good defense in an action for an escape, that the latter was privileged, and, therefore, the plaintiff having no right to arrest, had suffered no injury or wrong.

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3. **LACK OF WARRANT OF ATTORNEY**, in the record, was formerly cause for the reversal of the judgment. *Id.*
4. **QUESTIONING AUTHORITY TO BRING AN ACTION.**—A party may require the attorney of his adversary to produce his warrant of attorney, by showing that his rights will otherwise be jeopardized, and himself brought into litigation, without the consent of the man who stands on the record as his adversary. The authority of an attorney should not be capriciously demanded; and, if so demanded, the court will not order it to be produced. *Id.*
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7. **STRIKING OUT APPEARANCE.**—Where an attorney of record applies for permission to have his appearance stricken out, and the same is ordered, the presumption is that it was done by authority of the client. And the latter will not be entitled to a continuance, but will suffer a default if he does not answer anew, according to an order previously made, allowing the defendant to withdraw his plea. *Id.*
8. **AN ATTORNEY CAN NOT COMPROMISE** a suit by which land shall be taken instead of money; he has authority to do those things only which pertain to the conduct of the suit. *Huston v. Mitchell*, 506.
9. **AN ATTORNEY'S AUTHORITY** in Pennsylvania is more extensive than in other places. His directions to the sheriff, in regard to the mode and times of sale under an execution, are a justification to the sheriff, and are binding on the plaintiff. *Lynch v. Commonwealth*, 582.
10. **AN ATTORNEY IS NOT LIABLE** where he acts honestly, and in a way he thought was for the best interest of his client. *Id.*
11. **CONTRACTS BETWEEN ATTORNEY AND CLIENT.**—The law will not permit an attorney to take advantage of his relations with his client to make a

contract in reference to property in litigation to the latter's disadvantage. *Miles v. Ervin*, 623.

12. AN ATTORNEY AND HIS CLIENT are not under any legal disabilities to contract with each other; but the attorney must show that he has not used his influence over his client to his prejudice, and that he has paid a full and fair price. *Id.*
13. ATTORNEY AT LAW—POWER TO BIND CLIENT AFTER JUDGMENT.—An attorney has no power to receive in satisfaction of his client's judgment a bond from the judgment-debtor. *Smock v. Dade*, 780.

BAILMENT.

BAILER FOR HIRE, DUTY OF.—A person who pastures cattle for hire must keep his ground properly inclosed. *Cecil v. Preuch*, 171.

See PLEDGES.

BANKS.

See CORPORATIONS, 5.

BONA FIDE PURCHASERS.

1. A SUB-PURCHASER, in whole or in part, of an equity, will be protected from the acts of the original vendor and vendee, and may have a specific execution if he can show a complete equity against his immediate vendor, and also against the holder of the legal title. *Henderson v. Pickett's Heirs*, 130.
2. PARTIES.—In a suit by a sub-purchaser for specific performance, the intermediate vendors through whom he has acquired his equity are generally necessary parties. *Id.*
3. A DECREE IN A SUIT BY A SUB-PURCHASER against the intermediate vendors and the holder of a legal title for a specific performance of a contract of sale, is conclusive on all the parties; and hence, to entitle him to such decree, he must establish a valid equity against each. *Id.*
4. A SUB-PURCHASER, waiving his claim for specific performance, and suing for compensation for improvements made, should bring in the same parties, and establish the same equities as if he were seeking a specific performance. *Id.*
5. A PURCHASER PENDENTE LITE is concluded by the decree made in the case. *Id.*
6. A BONA FIDE PURCHASER of the legal title is not affected by a secret trust, of which he has not direct, express and positive notice. *Scott v. Gallagher*, 508.

BONDS.

1. FORFEITURE OF BAIL BOND.—The non-appearance of the debtor until the fourth day of the term appointed for hearing his petition, will not alone work a forfeiture of his bail bond, his counsel being present and procuring a continuance from day to day. *Sheets v. Hawk*, 486.
2. THE RELATIONSHIP SUBSISTING BETWEEN THE JOINT OBLIGORS of a bond is a matter wholly extraneous to the written contract, and parol evidence is therefore admissible to prove it. *Smith v. Tunno*, 617.
3. ON THE BREACH OF THE CONDITION of a bond, the penalty becomes a debt by specialty. *McDowell v. Caldwell*, 635.

4. **CONDITIONAL** bond, before condition broken, is not a present debt or demand provable against an intestate's estate. *Jones v. Cooper*, 678.
5. **BOND GIVEN TO INDEMNIFY** a surety on guardian's bond, and to save him harmless therefrom, can not be allowed against the estate of the deceased obligor, without its being shown how such surety has been damnified. *Id.*
6. **CONDITION OF SUCH BOND OF INDEMNITY** is not broken until the surety has actually paid the money, or has at least been sued on the original bond, and such surety is not damnified by the mere failure of the guardian to pay over money of his ward in his hands. *Id.*
7. **BREACH OF ANY SUBSTANTIVE PART** of the conditions of a bond works a forfeiture of the bond at law. *Id.*
8. **BOND CONDITIONED TO ACCOUNT** "when thereto requested," constitutes the request a part of the condition, and in assigning a breach, such request must be averred, and the time and place specified. *Id.*
9. **AVERMENT THAT THE INTESTATE DID NOT ACCOUNT** "when thereto required," is insufficient, where the request is parcel of the condition. *Id.*
10. **FORFEITURE OF INTESTATE'S BOND.**—Where a surety on a deceased guardian's bond, who has taken a bond of indemnity, is damnified after the commission upon the estate of the decedent is closed, the personal representative is still liable if any of the estate remains in his hands undisputed, after paying all the debts allowed under the commission. *Id.*
11. **SUPERSEDEAS BOND.**—The penalty of such a bond is fixed by the judge granting it. *Smock v. Dade*, 780.

See **ACTIONS**; **EVIDENCE**, 10; **GUARDIAN AND WARD**, 6; **INTEREST**, 1.

BOOKS OF ACCOUNT.

See **EVIDENCE**, 11.

BOUNDARIES.

1. **BOUNDARY.**—A line marked part of the distance, must be followed in the same direction for the whole distance, unless there is some marked corner to divert it. *Thornberry v. Churchill*, 125.
2. **WHEN MARKED CORNER TREES** can not be found, the point where the lines intersect is treated as the corner. *Id.*
3. **THE ORDER OF THE CORNERS** in a certificate of survey is of no importance in determining a question of boundary. *Id.*

See **ARBITRATION AND AWARD**.

CHECKS.

See **NEGOTIABLE INSTRUMENTS**, 10, 11.

COMMON CARRIERS.

1. **DELIVERY OF GOODS** to a carrier, by leaving them on the dock near his boat, according to the usual custom, will not render him liable, unless accompanied by express notice. *Packard v. Getman*, 475.
2. **CASE OR TROVER WILL LIE** against carrier for the non-delivery of goods, but to maintain trover a conversion must be proved. *Id.*
3. **DEMAND AND REFUSAL** are *prima facie* evidence of a conversion, but may be rebutted by other evidence. *Id.*

4. **CARRIER IS NOT LIABLE** for conversion where goods left on the dock without notice to him are lost, and are not shown to have come to his actual possession. *Id.*

CONFLICT OF LAWS.

1. **PARTNERS, LIABILITY OF.**—The liability of partners on a contract entered into with a third person, is governed by the *lex loci contractus*. *Baldwin v. Gray*, 169.
2. **INSOLVENT'S CONVEYANCE.**—A conveyance made by a citizen of Louisiana, who is insolvent, is void in that state, although valid by the laws of New York, where the same was executed. *Thorn v. Morgan*, 173.
3. **CONTRACTS MADE IN OTHER COUNTRIES** must generally be enforced according to the principles which govern the contracts in the places where they were entered into; but no nation or state will to its own injury enforce such contracts, nor will it enforce them when they are prohibited by the provisions of its positive laws. *Saul v. His Creditors*, 212.
4. **IN ALL MATTERS OF DOUBT** concerning which law ought to prevail, the court which decides will prefer the laws of its own country. *Id.*
5. **IF A HUSBAND AND WIFE REMOVE** after their marriage, their subsequent acquisitions will, in the absence of an agreement to the contrary, be controlled and distributed by and under the laws of the country into which they thus removed. *Id.*
6. **A CONTRACT BETWEEN HUSBAND AND WIFE**, made in Louisiana, and valid by its laws, will be enforced in Pennsylvania against the husband's executors. *Dougherty v. Snyder*, 520.

CONSIDERATION.

1. **FORBEARANCE TO SUE** is a sufficient consideration to support a promise to pay the debt of another. *King v. Upton*, 266.
2. **THE CONSIDERATION** for the payment of the debt of another need not be expressed in writing. *Id.*
3. **COMPROMISE OF A DOUBTFUL RIGHT** is sufficient consideration to support an agreement. *Chahoon v. Hollenback*.

See EVIDENCE, 1.

CONSTITUTIONAL LAW.

1. **DEEDS OF DECEDENT.**—The power of the legislature to provide for the sale of the property of a decedent to pay his debts is unquestionable. *Kibby v. Chitwood*, 143.
2. **SPECIAL ACTS** authorizing the sale of the lands of infant heirs to pay the debts of their ancestor, are unconstitutional. *Id.*
3. **A NEW CONSTITUTION** does not, it seems, supersede the prior constitution until put in operation by the legislature. *Cucullu v. Louisiana Ins. Co.*, 199.
4. **RETROSPECTIVE STATUTE REVIVING BARRED CLAIMS.**—A statute authorizing a probate court to renew a commission for the allowance of claims upon the estate of a deceased person, after the close of such commission and the expiration of the time limited by the general law for its renewal is retrospective, disturbs vested rights and revives rights which have been extinguished, and is, therefore, unconstitutional. *Bradford v. Brooks*, 715.

See ACKNOWLEDGMENT, 2, 4.

CONTRACTS.

1. **RESCISSION, GROUNDS FOR.**—If the vendor of a hotel agrees to convey with it the water privileges as they then were, and subsequently sells and conveys the land through which the water pipes pass, the vendee is entitled to a rescission of the contract. *Durrett v. Simpson*, 115.
2. **RESCISSION, BAR TO.**—If the complainant has disposed of and is unable to restore part of the consideration received by him, he can not obtain a decree of rescission; but it is otherwise where the disposal has been by the defendant. *Id.*
3. **ON RESCISSION** of a contract of sale, if the defendant, as part of the consideration, has received property which he can not restore, he must account for the price at which it was estimated in the contract, with interest thereon from the date at which he received possession of such property. *Id.*
4. **JOINT OBLIGATION—EXTINGUISHMENT OF.**—A receipt to a co-debtor for his part extinguishes the obligation *in solido*. *Baldwin v. Gray*, 169.
5. **IMPLIED CONTRACTS.**—When an express contract is in force, the law does not recognize an implied one; and when services are performed under an express contract, the action to recover for such services must be under the express contract, and that only, unless in consequence of the fault or consent of the defendant. *Waite v. Merrill*, 238.
6. **A MEMBER OF THE SOCIETY OF SHAKERS** is bound by his covenant with the society, whereby, on becoming a member, he stipulates never to make any claim for his services. *Id.*
7. **THE COVENANT EXACTED** by the society of shakers of its members is not void, and is not in violation of any constitutional right. *Id.*
8. **MONEY PAID** on an illegal contract, voluntarily and knowingly, can not be recovered back. *Id.*
9. **RATIFICATION OF IMPEACHABLE CONTRACT.**—A confirmation of an impeachable contract, to be valid, must be made with full knowledge of all the circumstances, with a view to confirm, and after the pressure and influence of the original transaction have been removed. *McCants v. Bee*, 610.
10. **A MODIFICATION** of an existing contract may be made by the parties thereto on any new consideration, and such new contract extinguishes the old. *Smith v. Turno*, 617.

See CONFLICT OF LAWS, 1, 2, 3, 6; CONSIDERATION.

CORPORATIONS.

1. **AN ECCLESIASTICAL SOCIETY**, established by local limits before the adoption of the constitution of this state, has not been thereby, nor by subsequent statutes, divested of its local character. *Atwater v. Woodbridge*, 46.
2. **PRESUMPTION OF INCORPORATION.**—A grant or charter may be presumed from long continued exercise of corporate powers; but to give rise to this presumption the acts done must bear the impress of corporate acts; must be such as corporations are competent and individuals incompetent to perform. *Greene v. Dennis*, 58.
3. **THAT THE YEARLY MEETING OF QUAKERS** kept records, had a clerk and treasurer, received contributions, exercised general supervision over the

- spiritual concerns of the Quakers, celebrated marriages, and admitted and discarded members, does not prove that it was a corporation. *Id.*
4. CORPORATIONS AS TRUSTEES.—Corporations, unless specially authorized, can not be seized of lands to the use of another. *Id.*
 5. LIEN OF BANK ON ITS STOCK.—A corporation which issues a certificate of stock, stating on its face that it is transferable, has not a lien on such stock as against a purchaser thereof. The purchaser may therefore compel the transfer of such stock to him on the books of the corporation. *Fitzhugh v. Bank of Shepherdsville*, 90.
 6. A CORPORATE SEAL is not essential to the validity of a certificate of stock. *Id.*
 7. THE ORDINANCES OF A MUNICIPAL CORPORATION have, when valid, as binding an effect on the members thereof as if they were statutes enacted by the state legislature.
 8. A CONTRACT TO RENT A HOUSE for a purpose forbidden by a valid city ordinance is illegal and can not be enforced. *Id.*
 9. THE ERECTION OF A PRIVATE HOSPITAL within the limits of a city may be forbidden by ordinance and thereby made unlawful. *Id.*
 10. A CORPORATION SUING must prove its incorporation where the general issue is pleaded. *Vernon Society v. Hills*, 429.
 11. TRUSTEES OF A CORPORATION chosen for a year hold over until others are elected. *Id.*
 12. IRREGULARITIES rendering void an election of trustees of a corporation for a single year, will not dissolve the corporation where only one third of the trustees are chosen annually; but it is otherwise where the irregularities are continued for three years. *Id.*
 13. TRUSTEES CHOSEN AFTER THE DAY are in by color of office, and the election is not absolutely void. Hence their acts are good, and the corporation continues. *Id.*
 14. ESTOPPEL of one dealing with a corporation to deny that it is a corporation relates only to the time of the contract, and does not prevent his claiming that such corporation was afterwards dissolved. *Id.*
 15. NON-USER OR MISUSER working a forfeiture of corporate rights can not be taken advantage of collaterally in an action brought by the corporation, but such forfeiture must be judicially declared in a direct proceeding for that purpose. *Id.*
 16. RELIGIOUS CORPORATIONS stand on the same footing in this respect as other corporate bodies. *Id.*
 17. OBJECTION TO THE RIGHT OF TRUSTEES suing *colore officii*, that they were not regularly elected, can not be sustained unless it be shown that proceedings have been instituted against them by the government and carried to judgment of ouster. *Id.*
 18. CORPORATION IS LIABLE FOR TORT committed by its authority. *Lyman v. White River Bridge Co.*, 705.
 19. CASE OF TRESPASS will lie against a corporation for a tort. *Id.*
 20. VOTE OF A CORPORATION authorizing an act which is *prima facie* within its corporate powers renders it liable for such act though it turns out to be a trespass; but perhaps it is otherwise where the vote shows on its face that the act is illegal. *Id.*
 21. VOTE RENDERING A CORPORATION LIABLE to indemnify its agents for an act performed thereunder, will make it liable also to the party injured by such act. *Id.*

22. **CORPORATION ACTS THROUGH AGENTS.**—A corporation can do no act except through the instrumentality of others. *Id.*
23. **ALLEGATION OF TRESPASS.**—Where a declaration alleges that a trespass was committed by a corporation, it must be understood on demurrer that an authority to do the act was given either under the corporate seal or by a corporate vote. *Id.*

See **CONTRACTS**, 6, 7; **PLEADING AND PRACTICE**, 25.

COSTS.

1. **COSTS ARE ALLOWED AT LAW**, although the plaintiff recovers a part only of his demand; unless the defendant prior to the commencement of the action tendered the sum due. *Saunders v. Frost*, 394.
2. **IN EQUITY**, costs are awarded, in the discretion of the court, to either party as justice may require; but the litigant who succeeds in equity is *prima facie* entitled to his costs; and the one who fails must show affirmatively some reason why costs should not be allowed against him. *Id.*
3. **A MORTGAGEE** always recovers his costs, unless it appears that the suit was occasioned by his unreasonable or fraudulent conduct, in which case he is liable for the costs. *Id.*
4. **COSTS IN EQUITY** where both parties are in fault will not be allowed to either. *Id.*

COURTS.

DECISIONS OF SUPREME COURT OF UNITED STATES, giving effect and interpretation to a law of the United States will be followed in the state courts. *Terry v. Bleight*, 101.

COVENANTS.

A COVENANT NOT TO SUE generally may be pleaded as a release. But a covenant not to sue for a limited period can not be pleaded in a creditor's action; the debtor's remedy is an action on the covenant. This latter doctrine does not apply to actions of assumpsit; accordingly, where the holder of a note stipulated not to sue the maker for a specified time, in consideration of a mortgage security given by the indorser, the maker may rely on the covenant, though no party thereto. *Clopper v. Union Bank*, 294.

See **DAMAGES**; **VENDOR AND VENDEE**, 5, 12.

CRIMINAL LAW.

1. **HIGH CRIMES AND MISDEMEANORS** are such immoral and unlawful acts as are nearly allied and equal in guilt to felony, yet, owing to some technical circumstance, do not fall within the definition of felony. The obstruction of a highway is not a high crime and misdemeanor. *State v. Knapp*, 68.
2. **IMPEACHING INDICTMENT BY OATH OF GRAND JURORS.**—Grand jurors may be examined as witnesses to show whether the necessary number concurred in finding an indictment. *Low's case*, 271.
3. **THE WANT** of the concurrence of grand jurors in the finding of an indictment may be shown, on motion in writing, in the nature of a plea in abatement, when the defendant is arraigned. *Id.*

4. **COMMON LAW—INDICTABLE OFFENSES AT.**—Adultery, fornication, and the like, were not indictable at common law. *Anderson v. Commonwealth*, 776.
5. **OFFENSES CONTRA BONOS MORES** are punished by the courts, but the jurisdiction in such cases should not be extended beyond the limit established by the adjudicated cases. *Id.*

CRUELTY.

See ALIMONY, 4.

DAMAGES.

DAMAGES FOR BREACH OF COVENANT OF WARRANTY, when the amount of the consideration is named in the deed, is that sum with interest from the date of the deed, and not from the time of actual payment, whether before or after such date. *McMillan v. Ritchie*, 107.

DEEDS.

1. **DELIVERY AFTER DEATH.**—A deed executed by the grantor, but retained in his possession, with directions to his wife to file it for record, after his decease, is inoperative for want of delivery in the life-time of the grantor. *Jones v. Jones*, 35.
2. **THE DATE OF A DEED** is presumed to be the time of its delivery. *Breckenridge v. Todd*, 83.
3. **CONSTRUCTION OF DEEDS.**—The proper construction of patents, conveyances, and other written muniments of title, is a question of law for the courts to determine. *Thornberry v. Churchill*, 125.
4. **DEED OF NON COMPOS MENTIS.**—The deed of a person *non compos mentis*, is voidable unless such person has a guardian, and if so, the deed is void. *Wart v. Maxwell*, 391.

See ACKNOWLEDGMENT; AGENCY; RECORDING.

DESERTION.

See ALIMONY, 6.

DEVIATION.

See INSURANCE, MARINE, 3, 4, 6, 7, 8, 9.

DEVISES.

See WILLS.

DIVORCE.

1. **THE RECORD OF THE CONVICTION** upon an indictment for adultery is evidence, in a subsequent suit for divorce brought against the defendant by his wife, both of the marriage and of the adultery. *Anderson v. Anderson*, 237.
2. **AMENDMENT.**—A libel for a divorce, on the ground of adultery, may be amended by adding a charge of extreme cruelty. *Id.*

DOMICILE.

See GUARDIAN AND WARD, 1; HUSBAND AND WIFE, 2.

DOWER.

1. **THE RECORD OF A RECOVERY BY THE WIFE**, in an action of covenant against the executors of the husband is not admissible in evidence under the plea of release of dower in an action of dower brought by her. *Barnet v. Barnet*, 516.
2. **EVIDENCE OF THE ANNUAL VALUE** of land of which the husband did not die seised is not admissible in an action of dower. *Id.*

EASEMENTS.

1. **THE RIGHT TO FISH** in an unnavigable stream is in the owner of the soil, to the exclusion of the public. *Waters v. Lilley*, 333.
2. **A CUSTOM TO TAKE ANYTHING** from another's land, or for a profit *a prendre*, is not a lawful custom. If such a right is available at all, it must be set up by prescription, as belonging to some estate, and should be pleaded with a *que estate*. It can not be given in evidence under the general issue. *Id.*
3. **RIGHT OF WAY BY PRESCRIPTION**.—A person does not have a right of way by prescription by passing over the lands of another in all directions, nor can a grant of such a way be presumed, however long continued. *Jones v. Percival*, 415.

See WATER-COURSES, 4, 5, 7, 11.

EMINENT DOMAIN.

1. **TAKING PRIVATE PROPERTY FOR PUBLIC USE**.—Individual property can not be taken, or individual rights impaired, for public use, without just compensation. *Ex parte Jennings*, 447.
2. **OWNER OF A LIMITED INTEREST** in property so taken, is entitled to compensation in proportion to his interest. *Id.*
3. **INTEREST IN A STREAM OF WATER** taken for public use is a subject for compensation. *Id.*
4. **RIGHT TO THE FLOW OF WATER** over land is commensurate with the interest in the land. *Id.*

EQUITY.

1. **FORGED DEED MAY IN EQUITY** be decreed to be delivered up and canceled. *Leigh v. Everheart*, 160.
2. **PERPETUATING TESTIMONY OF FORGERY**.—A party prejudiced by a paper alleged to be forged, may frame his bill so as only to perpetuate evidence of the forgery, or may add a prayer that the paper be surrendered and canceled. *Id.*
3. **EQUITABLE CONVERSION OF REALTY**.—An heir's interest in the land of his father, is an interest in realty, even after an order of probate to sell the same, until the sale has taken place; and no parol agreement can convert it into personalty so as to affect the lien of a third person. *Withers' Appeal*, 488.
4. **JURISDICTION OF COURTS OF EQUITY**.—Courts of equity have jurisdiction only in cases where the ordinary tribunals of justice can not afford relief. *Lining v. Geddes*, 606.
5. **THE MERE NOVELTY** of a question does not justify an inference of want of jurisdiction. *Id.*

6. **WHEN INJUNCTION WILL NOT BE GRANTED.**—Courts of equity will not interfere by injunction to prevent a mere trespass, unless there is danger of irreparable mischief, or the value of the inheritance is jeopardized; nor to prevent a private nuisance, unless it would injury such as no damages could compensate; nor to prevent the erection of obstructions that can be easily and speedily removed. *Id.*
 7. **SPECIFIC DELIVERY OF CHATTEL.**—As a general rule the court will not decree the specific delivery of a chattel, because in such case the party has a simple and adequate remedy at law, and to obtain such a decree it is necessary to show that the articles have acquired from some cause a value for the loss of which no damages would be a compensation. *Id.*
 8. **EQUITY WILL NOT ENTERTAIN JURISDICTION** merely to construe a will. *Bussey v. McKie*, 628.
 9. **EQUITY WILL NOT ENTERTAIN JURISDICTION** of a cause involving the title to land, where no discovery is sought, nor partition asked, nor title papers alleged to be in the defendant's possession, nor other ground of equity alleged. *Id.*
 10. **EQUITABLE PROVISION FOR THE WIFE** will be decreed where the husband resorts to equity to obtain possession of his wife's property; but not where he has had possession and has incumbered it, will equity disincumber it, and settle it on the wife. *Thomas v. Sheppard*, 632.
 11. **EQUITY HAS JURISDICTION** to restrain a tenant for life from wasting the property, or to compel him to give security to have the personalty forthcoming at the termination of the life-estate. *Smith v. Daniel*, 641.
 12. **RESORT IN EQUITY** to the personal assets of a debtor will only be permitted where the creditor has obtained judgment at law, and the execution issued thereunder can not be enforced without the aid of equity. *Screven v. Bostick*, 665.
 13. **THE WANT OF ADMINISTRATION** is a good objection at law or in equity to a suit against the estate. *Id.*
 14. **EQUITY JURISDICTION, WHEN ENTERTAINED.**—It is not sufficient to show that the subject-matter is within the jurisdiction of a court of equity, to authorize the retaining a bill; the complainant must show his right to bring the defendant into that court. *Id.*
 15. **IGNORANCE OF LAW** may sometimes be relieved against in equity. As in the case of a purchaser at an execution sale, who thought he was buying a fee-simple, where only an equity of redemption could pass; the purchaser would be considered a mortgagee in possession, and accountable for the rents and profits. *Lowndes v. Chisolm*, 667.
 16. **A SALE ON CREDIT** may be ordered by a court of equity. *Id.*
- See **ALIMONY**, 1. 5, 8, 9; **COSTS**, 2, 4; **EXECUTORS AND ADMINISTRATORS**, 6, 9.

ESTATES OF DECEASED PERSONS.

1. **ALL PROPERTY OF A DECEDENT**, subject to execution in his life-time, is, after his death, liable to the payment of his debts; and he can not, by his will, exempt any part to the prejudice of his creditors. He may, however, as against his heirs, provide that a certain portion of his estate be charged with the payment of his debts, and that the other parts be exempt. *Trumbo v. Sorrencey*, 103.

2. **SUBROGATION OF LEGATEES TO RIGHTS OF CREDITORS.**—If the creditors of a decedent seize and apply to the satisfaction of their claims, any personal property which has been specifically bequeathed, the legatee is, in a court of equity, entitled to stand in the place of such creditors, and to subject the lands descended to the payment of his legacy. *Id.*
3. **DISTRIBUTEES' RIGHTS** are governed by the state of things existing at the ancestor's death. *Teague v. Dendy*, 643.
4. **CLAIM** against an insolvent estate of a decedent can not be allowed by commissioners under the statute, unless it be a present debt or duty, or a demand *in presenti*, payable at all events *in futuro*; if its future payments rests upon a contingency, and it is uncertain whether any demand will accrue, it can not be allowed. *Jones v. Cooper*, 678.
5. **SAME PRINCIPLE** prevails in the proof of claims under commissions of bankruptcy. *Id.*
6. **UNCERTAINTY OF SUM CLAIMED** is no obstacle to the allowance of the claim, if there is a legal remedy or a demand *in presenti*, though payable *in futuro*. *Id.*
7. **EVERY CLAIM** arising out of gain or acquisition of the estate, through another's labor or property, or founded on a contract imposing a duty on the deceased obligor, which his representative is bound to perform, and upon which he is liable, may be proved against the estate. *Id.*
8. **CONTRACT FOR THE PAYMENT** of a stated sum, or the delivery of certain articles, or the performance of specific acts or services, which is to be performed at all events, though at a subsequent time, may be the subject of valuation; but not where its performance rests upon a contingency which may never happen. *Id.*

ESTOPPEL

1. **PARTIES.**—To use a judgment as a bar to another action, it must generally appear that the parties to both actions are the same. But there are exceptions to this rule. *Thompson v. Clay*, 108.
2. **A DECREE OF BILL DISMISSED**, for want of sufficient parties defendant, is, unless it reserves his rights, as conclusive on the complainant as a decree upon the merits. *Id.*
3. **FROM ASSERTING EQUITY.**—If the maker of a note induces another to purchase it, on the promise that it shall be paid, he is thereby estopped from asserting against such purchaser any equity he may have had against the original payee. *Morrison v. Beckwith*, 136.
4. **BY GIVING BOND TO RELEASE ATTACHED PROPERTY.**—A person who binds himself to hold the proceeds of certain property subject to the order of court, and thereby obtains the release of an attachment, and the possession of the property attached, is estopped from denying that the sheriff had a right in the property attached. *Morgan v. Furst*, 166.
5. **MISREPRESENTATION.**—A defendant in execution who points out property as his own, to be sold under the writ, and purchases it at the sale, is estopped from thereafter asserting that the property belonged to another. *Dubreuil v. Soulie*, 165.
6. **THE OBLIGOR OF A BOND** is estopped to set up an equitable defense thereto as against an assignee who took the bond on the obligor's statement that he had no defense. The estoppel will arise although the statement was

not made to the assignee, but merely in his presence. *McMullen v. Wenner*, 543.

7. WHERE ONE OF TWO PERSONS conspiring to defraud a third, testified in the course of a judicial proceeding, that a certain contract of sale was at end, neither will be permitted to set the contract up against the other. *Cook v. Grant*, 565.

See CORPORATIONS, 14.

EVIDENCE

1. OF CONSIDERATION.—A mortgage is evidence of the consideration therein named, as against the mortgagor and those claiming under him. *Breckinridge v. Todd*, 83.
2. ONUS OF PROVING TITLE.—When the plaintiff seeks the rescission of an exchange of lands, because, as he alleges, the defendant had no title, the onus of proving title is on the latter. *Id.*
3. INTEREST OF WITNESS.—If, at the taking of a deposition, the adverse party interrogates a witness touching his interest in the suit, this is an election of the mode of proof, and none other can be resorted to at the trial. *King v. Upton*, 286.
4. EVIDENCE ADMITTED BY CONSENT, in the court below, can not be objected to on appeal. *Eidelen v. Hardey's Lessee*, 292.
5. THE CERTIFICATES OF THE MASTER of the expenses incurred by an agent upon the vessel, are not admissible in an action by the principal against the agent; the master should be produced. *Newson v. Douglass*, 317.
6. INCOMPETENT, OBJECTION TO, WHEN WAIVED.—An objection to evidence as incompetent is waived unless made when the evidence is offered. *Ward v. Maxwell*, 391.
7. OF GENERAL GOOD CHARACTER IS INADMISSIBLE, by way of defense, in a civil action, in which a party is charged with a specific fraud. *Fowler v. Aetna Fire Ins. Co.*, 460.
8. IN CIVIL ACTIONS THE CHARACTER of every transaction must be ascertained by its own circumstances, and not by the character of the parties. *Id.*
9. A WITNESS MAY BE ASKED his opinion of the value of certain mortgaged land at the time of the entry of judgment on the bond. *Kellogg v. Krauser*, 480.
10. PAROL EVIDENCE IMPEACHING BOND.—In an action on a bond given for the debt of a third person, evidence is inadmissible to prove that the obligee had declared that the interest only during his life should be required, and that the bond should become void at his death, unless the obligor proves that such declaration was the inducement to executing the bond. *Hain v. Kalbach*, 484.
11. BOOKS OF ORIGINAL ENTRIES of a tailor are admissible, although the charges are made after the work is cut and delivered to a journeyman, but before it is completed, such being the usual manner in which the books were kept. *Kaughley v. Brewer*, 554.
12. A DEVISEE WHO RELEASES ALL INTEREST under a will is a competent witness for the trustee appointed by it. *Cook v. Grant*, 564.
13. PAROL EVIDENCE is admissible to show that it was the understanding and agreement of all the parties to a lease that for the last nine months no rent should be payable. *Hultz v. Wright*, 575.

14. **WEIGHT OF EVIDENCE.**—Mere opinions founded on data that do not justify the conclusion reached, can not outweigh the positive statement in the answer of a defendant who had positive knowledge of the facts alleged. *Simpson v. Feltz*, 602.
 15. **PAROL EVIDENCE**, varying or contradicting a receipt, is admissible if such receipt contains general or vague expressions, but if it is definitely descriptive of what is intended to be affected by it, it can not be assailed by parol testimony, except on the ground of fraud. *Raymond v. Roberts*, 698.
 16. **DIFFERENT WRITINGS** may be construed together as one instrument, if they are between the same parties and upon the same subject, and especially if executed at the same time. *Id.*
 17. **TESTIMONY AS TO DECLARATIONS**, or admissions of a party is generally to be weighed with caution; yet if the declarations appear to have been understandingly made, and are satisfactorily proved, they are strong evidence against him. *Myers v. Brownell*, 729.
 18. **DEPOSITIONS.**—A notice to take a deposition must specify the time and place of the taking of the same. *Hunter v. Fulcher*, 738.
 19. **FOREIGN LAW, AUTHENTICATION OF.**—The law of another state is sufficiently authenticated under the act of congress, if the seal of the state is affixed thereto; and a person need only to produce the section of the law so authenticated upon which he relies. *Id.*
- See **DIVORCE**, 1; **DOWER**; **FOREIGN LAWS**, 5; **NEW TRIALS**, 1, 2, 3, 4; **PAYMENTS**, 3; **SALES**, 18, 19; **WILLS**, 1.

EXECUTIONS.

1. **JUDGMENT MUST BE PRODUCED** to support a title based on a sale under execution. *Terry v. Bleight*, 101.
2. **LICENSE OF PURCHASER AT SALE.**—A purchaser at an execution sale has a license to enter upon and remove a building placed on the plaintiff's land with his permission by the judgment-debtor. *Doty v. Gorham*, 417.
3. **AUTHORITY OF OFFICER PRESUMED.**—A person levying an execution and making a sale of property in pursuance thereof, is presumed to be an officer properly authorized, and it is not necessary for a purchaser to show that such person was an officer *de jure*. *Id.*
4. **PURCHASERS AT SALES** against vendor and vendee respectively, stand in the relation of vendor and vendee with their respective rights and liabilities. *Chahoon v. Hollenback*, 587.
5. **SATISFACTION OF.**—The mere fact that the word "satisfied," is written upon an execution in the sheriff's office, does not destroy nor postpone the lien of the judgment-creditor. Nothing but actual payment is a satisfaction of the judgment. *Sims v. Campbell*, 595.
6. **AN EXECUTION INDORSED SATISFIED**, may be shown not to have been, in fact, fully paid. *Id.*
7. **AFTER RETURN-DAY** execution can not be executed, and a seizure of property under it will be a trespass. *Barnard v. Stevens*, 733.
8. **EXECUTION BEGUN BEFORE THE RETURN-DAY** may be completed afterwards. *Id.*
9. **AMENDMENT OF RETURN** may, in general, be made at the term to which the process is returnable, or at any subsequent term, if the rights of third

- persons will not be affected, and there is something in the record to amend by. *Id.*
10. **AMENDMENT AFTER ACTION AGAINST SHERIFF.**—It would be extremely dangerous to permit an officer to amend his return after the lapse of six years, and after an action commenced against him, by inserting a fact which would go to defeat the action. *Id.*
 11. **AFTER PROCESS IS RETURNED** the officer can not alter or amend his return without leave of court. *Id.*
 12. **FEES.**—If an officer levy under an execution, he is entitled to fees for poundage as well as travel, though the parties compromise before a sale. *Id.*
 13. **WHERE AN EXECUTION IS PAID TO THE CREDITOR** before levy or service, and that fact is indorsed on the writ, the officer is not entitled to fees, for he has performed no act to earn any; and as there is nothing due on the writ, no levy can be made. *Id.*
 14. **LIABILITY OF PARTY FOR OFFICER'S ACTS.**—For any irregularity of an officer in executing valid process, or for any act not authorized by the process, the party suing it out is not liable, unless the officer acts under his orders or direction. *Id.*
 15. **PARTY PRESUMED CONCERNED IN TRESPASS, WHEN.**—After verdict for the plaintiff in an action of trespass against an officer who executed process and the party suing it out, for taking certain property, where the exceptions state that the taking was proved without confining it to the officer, it will be presumed that the jury found that the party either directed or participated in the trespass. *Id.*
 16. **ISSUED ON SATISFIED JUDGMENT MAY BE QUASHED ON MOTION.**—A motion to quash an execution issued on a satisfied judgment is the proper proceeding in place of an *audita querela*, which is now an obsolete remedy; and on such a motion the court may order questions of fact to be tried by a jury. *Smock v. Dade*, 780.

• See ESTÖPPEL, 5.

EXECUTORS AND ADMINISTRATORS.

1. **AN EXECUTOR WHO VOLUNTARILY PAYS LEGACIES** within the year, without taking a refunding bond, is guilty of a *devastavit*. *Dougherty v. Snyder*, 520.
2. **AN EXECUTOR HAS NO POWER** to sell property after he has delivered it over to the legatee. *McCants v. Bee*, 610.
3. **ADMINISTRATORS** should confine the maintenance of the children to the income of the estate; nor should they exceed it, except in cases of necessity, upon application to the court. *Teague v. Dendy*, 643.
4. **MODE OF CALCULATING INTEREST** on funds received in the course of administration. *Id.*
5. **ADMINISTRATOR** will not be allowed expenses incurred in the ordinary course of administration; for expenditures made in procuring services which the administrator could not be supposed competent to render, he will be reimbursed. *Id.*
6. **THE SURETIES** on an administration bond must be sued at law; the remedy against them is not in equity. *Id.*
7. **AN EXECUTOR DE SON TORT** liable as such in equity is also liable at law. *Screven v. Bostick*, 665.

8. **PERSONS INTERMEDDLING** with a decedent's estate are liable to the executor or administrators only. *Id.*
9. **HEIRS MAY COMPEL AN ACCOUNTING.**—The representatives of an executor may be compelled to account for the proceeds of the estate of a deceased testator by the heirs of the latter, without an administration *de bonis non* on the testator's estate. *Graff v. Castleman*, 741.

FACTORS.

- A. **CUSTOM OR USAGE** among factors, to mix in one parcel the goods of different consignors, and upon a sale of the same to charge the purchaser with the same, and in some cases to take negotiable notes therefor, and negotiate the same as their own property, and in case of the failure of the purchaser to charge the consignor with the debt as a bad debt, was held not to prevent a recovery by a consignor who could trace his goods, or the proceeds thereof, in the hands of the factor or his trustee. *Chesterfield Mfg. Co. v. Dehon*, 367.

FEMES-COVERT.

See **ACKNOWLEDGMENT**, 1, 2, 4; **HUSBAND AND WIFE**.

FIXTURES.

1. **GENERAL RULE** as to fixtures is that whatever is annexed to the freehold becomes part of it, and can not be removed. *Miller v. Plumb*, 456.
2. **EXCEPTIONS HAVE BEEN ADMITTED** between landlord and tenant, and between tenant for life or in tail, and the reversioner, from motives of public policy. *Id.*
3. **BETWEEN VENDOR AND VENDEE**, and between executor and heir, the general rule holds, and fixtures annexed by the vendor or ancestor, even for purposes of trade, pass with the realty. *Id.*
4. **POTASH KETTLES SET IN MASONRY**, appertaining to an ashery, though not fastened to the building, are fixtures, and pass to a vendee of the realty. *Id.*

FOREIGN JUDGMENTS.

See **JUDGMENTS**.

FOREIGN LAWS.

1. **THE LAWS OF SPAIN** concerning acquisition by husband and wife after marriage considered and explained. *Saul v. His Creditors*, 212.
2. **THE CONSTRUCTION GIVEN** by commentators to the laws of Spain, and acquiesced in by its courts and sovereign, makes as much a part of the law of Spain at this day as if the statute had been modified by the legislature. *Id.*
3. **THE JURISPRUDENCE, OR COMMON LAW**, of some nations may be found in the decrees of their courts; in others it is furnished by private individuals eminent for learning, integrity and wisdom. *Id.*
4. **THE OPINIONS OF THE JURISCONSULTS OF SPAIN** obtained an authority unequalled in any other country. *Id.*
5. **LAW OF FOREIGN COUNTRY, HOW PROVED.**—The unwritten law of a foreign country may be proved by the testimony of persons learned in the

laws of such country; and foreign laws, if not shown to be in writing, may be proved in like manner. *Dougherty v. Sayder*, 520.

See EVIDENCE, 19.

FORGERY.

See EQUITY, 1, 2.

FRAUD.

1. COURTS OF EQUITY WILL RELIEVE against presumptive fraud, and will set aside hard and unconscionable contracts, even in cases where there is no actual fraud; especially if such contracts are made by parties acting in a fiduciary capacity. *McCants v. Bee*, 610.
2. TO TAKE ADVANTAGE of a man's necessities is as bad as to take advantage of his weakness. *Id.*

See FRAUDULENT CONVEYANCES; VENDOR AND VENDEE, 11.

FRAUDULENT CONVEYANCES.

1. A VOLUNTARY CONVEYANCE, made with a view to a family settlement, will be effectuated and recognized in equity. *Jones v. Jones*, 35.
2. THE AGENT OF A FRAUDULENT VENDOR of goods can not set up the fraud in an action by the fraudulent vendee to recover the property. *Newson v. Douglass*, 317.
3. CONSIGNMENT FOR SALE.—Plaintiff furnished C., an insolvent, with goods to be sold at C.'s shop. The goods were to remain plaintiff's property, and C. was to pay for them at certain prices when the same were sold, and to account with plaintiff for all goods sold at the prices fixed; C. to retain all over such prices as his profit. Goods sold on credit were at C.'s risk, and if any remained unsold, they were to be returned to plaintiff: *Held*, that whether such a consignment was *bona fide* was for the jury to determine, and that the same was not fraudulent in law as to C.'s creditors. *Patten v. Clark*, 365.
4. SALE OF CHATTELS.—An agreement upon the sale of personal property, that the vendee shall have possession, but that the property shall remain in the vendor until the purchase-money is paid, is fraudulent against creditors and the sheriff. *Martin v. Mathiot*, 491.

See FRAUD; SALES, 13, 14, 15, 16.

FREIGHTAGE.

See SHIPPING, 12, 13.

GIFTS.

GIFTS MADE PER VERBA IN PRESENTI vest in those only who are then in esse. *Myers v. Myers*, 648.

GRAND JURY.

See CRIMINAL LAW, 2, 3.

GRANTS.

1. UNCERTAINTY.—A grant to the inhabitants of Dale, or to the commoners of a certain waste, or to the people of a county, is void. *Greene v. Dennis*, 58.

2. PRESUMPTION of a grant of incorporeal hereditaments arises from an adverse occupancy of fifteen years in analogy to the statute of limitations. *Mitchell v. Walker*, 710.
3. POSSESSION MUST BE ADVERSE to the true owner to authorize a presumption of a grant. *Id.*
4. TO CONSTITUTE SUCH ADVERSE POSSESSION all that is necessary is that it should be accompanied by a claim of right. *Id.*
5. CONDITIONAL grant may well be presumed from lapse of time. *Id.*
6. PRESUMPTION of a grant is not a legal presumption, but arises from matter of evidence, and must be drawn by the jury. *Id.*
7. ASSERTION OF RIGHT by the original owner within fifteen years, and an admission thereof by the occupant, either express or implied, will rebut the presumption of a grant, even though such admission is founded on a mistake of facts. *Id.*

GUARANTY.

See CONSIDERATION, 1, 2

GUARDIAN AND WARD.

1. PERSONS NON COMPOS MENTIS—DOMICILE OF.—The domicile of a person *non compos mentis*, may be changed by the direction or assent of the guardian of such person, whether express or implied; and the domicile of a person *non compos*, who resided for many years, and died in Middlesex county, was held to be in that county, notwithstanding her guardian, who supported her, lived in Suffolk, and letters of administration on her estate granted by the probate judge of Suffolk, were held void for want of jurisdiction. *Holyoke v. Haskins*, 372.
2. WHAT WAS INTENDED AS A GRATUITY, can not be converted into a demand. A guardian who invites his minor wards to live with him gratuitously, shall not be permitted to charge them for board. For clothing and other necessities furnished them he may be reimbursed. *McDowell v. Caldwell*, 635.
3. A GUARDIAN CAN NOT USE THE CAPITAL of the ward for his subsistence, except under peculiar circumstances. *Id.*
4. A GUARDIAN WILL NOT BE ALLOWED INTEREST on moneys advanced beyond his ward's income. *Id.*
5. A GUARDIAN IS ENTITLED TO REIMBURSEMENT for expenditures incurred in prosecuting a claim of his ward. *Id.*
6. THE SURETY OF A GUARDIAN is liable for moneys in the guardian's hands at the time of the execution of the bond, though received previously, as well as for moneys subsequently collected. *Id.*

See BONDS, 5, 6, 10.

HOLIDAYS.

THANKSGIVING DAY.—A service of civil process upon this day, is prohibited by statute, and is therefore void. *Gladwin v. Lewis*, 34.

HUSBAND AND WIFE.

1. LANDS GIVEN BY THE GOVERNMENT to a husband or wife during coverture are the separate estate of the spouse to whom they are so given. *Rouquier v. Rouquier*, 186.

2. **DOMICILE OF WIFE.**—A wife can not be a citizen of a state different from that in which her husband resides, so as to enable her to sue in the United States courts. *Dougherty v. Snyder*, 520.
3. **A WIFE CAN NOT**, in general, sue her husband in Pennsylvania. She has, therefore, six years from his death, within which to bring suit against his executor. *Id.*
4. **THE RIGHT OF A FEME-COVERT**, to sue her husband, is merely suspended during the coverture, but is not destroyed. She may therefore sue his executors after his death. *Id.*

See ALIMONY; CONFLICT OF LAWS, 5, 6; STATUTES, 7.

ILLEGITIMATE CHILDREN.

See SUCCESSION.

INFANCY.

1. **MINOR'S SERVICES.**—An agreement by a parent with his minor child to relinquish his right to its services or earnings is valid and irrevocable. *Morse v. Welton*, 73.
2. **RATIFICATION OF INFANT'S CONTRACT.**—A mere acknowledgment by one after arriving at full age, of a debt contracted during his infancy, is not sufficient. There must be an express ratification. *Thompson v. Lay*, 325.
3. **A CONDITIONAL PROMISE TO PAY** when the defendant is able, imposes on the plaintiff the necessity of proving ability. *Id.*

See EXECUTORS AND ADMINISTRATORS, 3; GUARDIAN AND WARD; PARENT AND CHILD.

INJUNCTIONS.

See 6, 12.

INSANITY.

See DEEDS, 4; GUARDIAN AND WARD, 1.

INSOLVENCY.

1. **A GENERAL ASSIGNMENT** by an insolvent debtor in trust to pay the proceeds in satisfaction of the claims of certain of the creditors in full, and to apply the residue *pro rata* among such creditors as shall, within a given time, release their claims against the debtor is invalid, as against a dissenting creditor, so far as respects the surplus not wanted to discharge the demands of those who have assented. *Borden v. Sumner*, 338.
2. **IN SUCH A CASE** one summoned as trustee of the debtor, under a foreign attachment, was adjudged trustee, it not appearing that the amount due from him was needed for the payment of the assenting creditors. *Id.*
3. **ASSIGNMENT DOES NOT TRANSFER FUNDS HELD AS FACTOR OR TRUSTEE.**—An assignment for the benefit of creditors does not transfer the property held by the assignors as factors, nor any proceeds derived from a sale of such goods, and the consignors may pursue such goods, or the price of them, notwithstanding such assignment. *Chesterfield Mfg. Co. v. Dehon*, 367.

4. **PAYMENT TO AN INSOLVENT DEBTOR** the day after his discharge and assignment is not valid, though the payor has no actual notice of the assignment. *Wickersham v. Nicholson*, 479.
5. **THE RECORD OF DISCHARGE** of an insolvent debtor is conclusive that he complied with all things required by law to entitle him to a discharge, and can not be inquired into collaterally. *Sheets v. Hawks*, 486.
See **CONFLICT OF LAWS**, 2; **ESTATES OF DECEASED PERSONS**, 4.

INSURANCE—FIRE.

1. **THE RULE HOLDS IN FIRE INSURANCE**, as well as in marine insurance, that the description of the property in the policy is a warranty by the insured, and an error therein, whether it arise from design or mistake, is equally fatal to his right of action on the contract. *Fowler v. Aitna Fire Ins. Co.*, 460.
2. **CONCEALMENT** of the true state of the property insured is a fraud, though the insured need not state what the insurer knows. *Id.*
3. **POLICY DESCRIBING "FRAME HOUSE FILLED IN WITH BRICK"** as containing the goods insured is void, if the walls of the house are not filled in with brick. *Id.*

INSURANCE—MARINE.

1. **ILLICIT TRADE.**—Under a policy of insurance in which the insurers exempt themselves from liability for loss arising from illicit trade, they are not responsible for any seizure for illicit trade at any distance from the shore, where, by the law of nations, such seizure could be rightfully made. *Cucullu v. Louisiana Ins. Co.*, 199.
2. **CONDEMNATION FOR ILLICIT TRADE.**—A condemnation *jure belli*, and for a breach of municipal regulations will falsify the warranty by which the insurer was protected from loss from illicit trade. *Id.*
3. **DEVIATION.**—On a policy of marine insurance, the underwriters are presumed tacitly to assent to all reasonable efforts on the master's part for the safety of the property insured, and to authorize the usual means of avoiding urgent danger, whether from a peril insured against or not. *Riggin v. Patapsco Ins. Co.*, 302.
4. **IDEM.**—There is no distinction between moral and physical necessity in justifying a departure from the voyage insured. *Id.*
5. **THE INSURED MUST FURNISH** a master of competent skill, prudence and discretion; and if a departure from the course of the voyage is the result of employing a master not of that character, the insurers will be discharged. *Id.*
6. **MERE APPREHENSION OF DANGER**, unless founded on reasonable evidence, does not justify a deviation. The peril apprehended must be one that would occasion serious loss or injury; it must be imminent and obvious, not problematical or contingent. *Id.*
7. **THE FEAR OF CAPTURE** at the port of destination, founded on mere rumors that the port had fallen into the hands of the enemy, will not justify a departure from the voyage. *Id.*
8. **IDEM.**—If such apprehended danger would justify a departure, the master should have gone to a port in the direct course of the voyage, and not to one many hundred miles out of the course. *Id.*
9. **THE QUESTION OF DEVIATION** is one of law, where the facts are admitted. *Id.*

10. **POLICY "FOR WHOM IT MIGHT CONCERN."**—In an action to recover the amount of an insurance received on a policy effected in the defendant's name, "for whom it might concern," the defendant may give in evidence letters from a third person to him, on whose behalf he acted as agent in procuring the insurance. *Newson v. Douglass*, 317.
11. **BY "WHOM IT MAY CONCERN,"** in a policy, is meant not any and everybody who may chance to have an interest in the thing insured, but such only as are in the contemplation of the contract. *Id.*
12. **THE ABSENCE** of this general clause and phrases of similar import, entitle only those to recover on a policy who are named therein, or for whose benefit it is expressed to be made. *Id.*
13. **UNDER THIS CLAUSE,** a party interested, and for whose benefit the policy was effected, by subsequent adoption thereof, may recover, equally as in case of a prior order for an insurance. *Id.*
14. **WARRANTY IN A MARINE POLICY** being in the nature of a condition precedent, must be fulfilled by the insured before he can recover on the contract, whether the thing warranted be material or not, and whether the breach of warranty proceed from fraud, negligence, misinformation, or any other cause. *Fowler v. Aetna Fire Ins. Co.*, 460.
15. **DESCRIPTION OF A VESSEL** is a warranty. *Id.*

INTEREST.

1. **IS RECOVERABLE AS OF RIGHT** in cases of bonds, written contracts for the payment of money, contracts for the payment of interest, and where the money claimed has been actually used. With these exceptions the practice is to leave the question to the jury. *Newson v. Douglass*, 317.
2. **COMPOUNDING.**—A practice by a storekeeper to balance his books annually, and charge interest on the balance of a running account where there has been no settlement, is illegal. *Graham v. Williams*, 569.
3. **WHEN ALLOWED.**—Where one has retained money belonging to another, it is presumed that he kept it for the purpose of profit, and he must, therefore, pay interest on it. *Simpson v. Feltz*, 602.
4. **COMPOUND INTEREST MAY BE ALLOWED IN SOME CASES.** *Myers v. Myers*, 648.

See EXECUTORS, 4; GUARDIAN AND WARD, 4.

INTERNATIONAL LAW.

1. **THE AUTHORITY OF A NATION** can not extend beyond its territory, except where the sea is a boundary, in which case it extends to the distance of a cannon shot from the shore. *Cucullu v. Louisiana Ins. Co.*, 199.
2. **A NATION'S RIGHT** to protect itself from injury is not restrained to its boundaries. It may watch its coast and seize vessels approaching with intent to violate its laws, although they are more than the distance of a cannon shot from its shores. *Id.*
3. **THE EXTENT OF BELLIGERENT RIGHTS** is defined by the law of nations. Any law going beyond these rights derives its authority from the nation which enacted it, and its violation must be punished under the laws of such nation. *Id.*
4. **RIGHT TO PROHIBIT IMPORTATION.**—A nation has the right to refuse to permit the importation of merchandise from any foreign country. *Id.*

INTERVENTION.

1. **WHO MAY INTERVENE.**—A person must have an interest that is direct and closely connected with the object in dispute, founded on some right, claim or lien, either conventional or legal, to be allowed to intervene. *Brown v. Saul*, 175.
2. **CREDITOR MAY INTERVENE, WHEN.**—A creditor whose claim has not been liquidated by a judgment has no right to intervene in an action between his debtor and a third person. *Id.*
3. **WHEN INTERVENOR HAS NO RIGHT TO URGE IRREGULARITIES.**—A person has no right to intervene in an action for the purpose of having the cause dismissed for irregularities in the proceedings. *Clamageran v. Bucks*, 185.

JUDGMENTS.

1. **THE SENTENCES OF FOREIGN COURTS** of admiralty are conclusive upon all the matters decided. *Cucullu v. Louisiana Ins. Co.*, 199.
2. **FOREIGN COURT OF ADMIRALTY.**—The right belongs to every court to examine whether the judgment or decree offered to it emanates from an authority competent by the laws of nations, to act in the matters on which it has pronounced judgment. *Id.*
3. **THE COURTS OF EACH NATION** are the proper tribunals to interpret its laws, and their decisions must be followed in other countries. *Id.*
4. **THE REGULARITY OF THE PROCEEDINGS** of a foreign court of admiralty can not be gone into, if its action was in a cause wherein it had jurisdiction. *Id.*
5. **A CONDEMNATION** not sanctioned by the laws of war, can not be considered one *jure belli*. *Id.*
6. **A FORMER JUDGMENT** against a defendant in ejectment declaring a supposed will invalid, is not a bar to the defendant's offering evidence, in a subsequent ejectment suit, of the legality of the will. *Edelen v. Hardy's Lessee*, 292.
7. **JUDGMENT ALONE** does not transfer title or destroy the debtor's seisin and capacity to convey. *Fuller v. Hubbard*, 423.
8. **A JUDGMENT WOULD NOT BE A LIEN** even in the hands of an assignee thereof, where he has notice that the same was entered up at a time when the assignor, for a valuable consideration from the defendant, had agreed that judgment should not be entered. *Kellogg v. Krauser*, 480.
9. **NOTICE OF SUCH AN AGREEMENT** need not be in writing, nor received from a record. Any notice that would leave the party in no reasonable doubt would be sufficient. *Id.*
10. **TO DEFEAT THE LIEN OF A JUDGMENT**, declarations of the assignor thereof are admissible against the assignee, tending to prove that at the time the assignor agreed, for value received from the defendant, not to enter up judgment, such judgment had in fact been entered. *Id.*
11. **JUDGMENT FOR THE PLAINTIFF IN REPLEVIN** on the issue of no rent in arrear, is conclusive in a subsequent action of use and occupation for the same rent, if the pleadings show that a certain rent was reserved, and that the distress was made for the rent now claimed, whether the former judgment be pleaded, or given in evidence under the general issue. *Cist v. Zeigler*, 573.

12. A **SCIRE FACIAS TO REVIVE** a judgment should name the terre-tenants, or the sheriff's return should state that the parties notified were the tenants, and whether of the lands bound by the judgment. *Chabon v. Hollenback*, 587.
13. **OMISSION TO NAME SOME OF THE TENANTS** in the writ is pleadable in abatement. *Id.*
14. **MERE OCCUPANTS** are not terre-tenants; those only who are owners of the fee are such. *Id.*
15. **APPEARANCE**.—A motion by an attorney to set aside a judgment taken by default is not an appearance for the party. *Id.*
16. **UNDER A SCIRE FACIAS** to revive a judgment those only can claim as tenants who became such by conveyance subsequent to the judgment. *Id.*
17. **THE LIEN OF A JUDGMENT** extends to the interest as well as the principal. *Sims v. Campbell*, 595.
18. **JUDGMENT**, where there are not proper plaintiffs, as where an action is brought in the names of the selectmen of a town which should have been brought in the name of the town, is conclusive until reversed, and can not be collaterally impeached. *Allen v. Huntington*, 702.
19. **JUDGMENT IRREGULARLY OBTAINED** is nevertheless a judgment to all intents and purposes until set aside or vacated. *Id.*
20. **JUDGMENT** founded on an original writ declared void by statute, for want of a particular indorsement, where the statute is silent as to the judgment, is voidable merely and not void. *Id.*
21. **JUDGMENT, WHEN VOID**.—As a general rule, a judgment is void in no case except where it appears from the judgment itself that the court has no jurisdiction. *Id.*
22. **WHERE AN IRREGULAR JUDGMENT** is set aside, the consequences, as between the parties, are the same as if no judgment had ever existed. *Id.*
23. **ERRONEOUS JUDGMENT**, though afterwards reversed, affords protection for all acts done under it. *Id.*
24. **JUDGMENT BY DEFAULT** should be entered in an action on a negotiable instrument subject to any credit indorsed on the note. *Rees v. Conococheague Bank*, 755.
25. **EQUITY—RELIEF AGAINST A JUDGMENT**.—Equity will not relieve against a judgment on the ground of usury, unless that matter is put directly in issue; nor against a judgment by default, unless good cause appear for not defending at law. *Brown v. Toell's Admr.*, 759.

See PLEADING AND PRACTICE, 18; PROCESS, 3.

JUDICIAL SALES.

VOID PROBATE SALE.—An authority to an administrator to sell real estate of the deceased to pay debts barred by the statute of limitations, is void, and a purchaser at such sale acquires no title to the property, but he is entitled to the value of the improvements placed by him on the land, under the limitation and settlement act. *Heath v. Wells*, 383.

JURISDICTION.

1. **THE SUPREME COURT OF MASSACHUSETTS**, under the statute of 1817, c. 87, has chancery jurisdiction co-extensive with that exercised by the court of

- chancery of England, so far as is consistent with the constitution and laws of the commonwealth. *Jones v. Boston Mill Corporation*, 358.
2. THIS COURT MAY RENDER A DECREE against a corporation, and enforce it by a *distringas*, sequestration or other form of process necessary to carry the decree into execution. *Id.*
 3. COURTS OF COMMON PLEAS have jurisdiction to entertain a motion to strike out or open a judgment entered on a warrant of attorney, or to order a feigned issue to ascertain necessary facts. *Kellogg v. Krauser*, 480.

See EQUITY; WILLS, 13.

LANDLORD AND TENANT.

1. A TENANT OF A MORTGAGOR may attorn to the mortgagee, after the mortgage has become forfeited, and may thereupon successfully defend an action brought against him by the mortgagor upon the lease. *Magill v. Hinsdale*, 70.
2. ACTION FOR USE AND OCCUPATION OF LAND FOUNDED ON MISTAKE.—Several heirs of the decedent having entered into an agreement with one another for a division of the estate, but referring to a plat to be thereafter made and a deed to be thereafter executed to consummate the partition, and having gone into possession and occupied in severalty for more than thirty years, when a will was discovered devising the whole lands to one of them, it was held that, as the possession of the others was founded in mistake, the law implied a promise on the part of each to pay a reasonable rent for the parcel so held by him. *Jordan v. Jordan*, 249.
3. TENANT CAN NOT MAKE REPAIRS at the landlord's expense, without a special agreement between them authorizing it. *Mumford v. Brown*, 440.
4. TENANT IN COMMON is not liable for repairs made by co-tenant upon common property, without a previous request and refusal to join in making such repairs, even though the repairs be proper and necessary. *Id.*

See FIXTURES, 2.

LEGACIES.

ADemption OF.—Where a legacy is given to a child, and afterwards an advancement is made to such child, the same will be presumed to be in satisfaction of the legacy, but such presumption may be rebutted; and although the thing advanced is not of the same kind as the thing bequeathed, it may be proved that it was the testator's intention that one should be in satisfaction of the other. *Jones v. Mason*, 761.

See ESTATES OF DECEASED PERSONS, 2; EXECUTORS AND ADMINISTRATORS, 2.

LICENSE.

A PAROL LICENSE, without consideration, to use the waters of a stream for a saw-mill, can not be revoked at the grantor's pleasure, where the grantee, in consequence of the license, has erected a mill. *Rerick v. Kern*, 497.

LIENS.

1. TIME OF CONTINUANCE of judgment-lien is to be determined by the record, and not by any private agreement of the parties not appearing thereon. *Bombay v. Boyer*, 494.

2. **ESTIMATING THE STATUTORY TIME** from the date of the judgment, is not inequitable, although the purchaser, at the time of his purchase, was informed that the execution could not be issued until a time less than five years before his purchase. *Id.*
3. **THE LIEN ON PERSONAL PROPERTY** left in pledge or subject to an equitable lien, may be enforced in equity, if the property has been taken by the debtor from the pledgee. At law the lien incident to a pledge depends upon possession. *Coleman v. Shelton*, 639.
4. **RENT OF PROPERTY** conveyed as security to indemnify the grantee against liability as surety for the grantor, constitutes a part of the security and can not be recovered by the grantor until the liability is discharged. *Sellick v. Munson*, 689.
5. **SURETY'S LIEN** on such rent is not extinguished, but rather confirmed, by an agreement that moneys in his hands due the plaintiff are to be applied on the debts for which he is surety. *Id.*

See CORPORATIONS, 5; JUDGMENTS, 8, 10, 17.

LIS PENDENS.

See BONA FIDE PURCHASERS, 5.

MALICIOUS PROSECUTION.

1. **AN ACTION** for a malicious prosecution will not lie against one who, pursuant to advice of counsel sought in good faith, commences an action, believing that he has sufficient cause therefor. *Stone v. Stolt*, 349.
2. **AN ALLEGATION** that a suit was maliciously commenced will not be supported by evidence which shows that the defendant brought his action believing that he had good cause therefor, but detained property attached, after learning that his suit was groundless. *Id.*

MANDAMUS.

1. **MANDAMUS LIES** to compel appraisers to appraise property taken for public use when they refuse to do so. *Ex parte Jennings*, 447.
2. **ALTERNATIVE MANDAMUS** may issue in such a case to give the appraisers an opportunity to put the facts on record by their return, where the question is deemed of sufficient importance to render a review on error desirable. *Id.*

MORTGAGES.

1. **CONTRIBUTION TO DISCHARGE.**—If all the mortgaged premises are sold to different persons, in separate parcels, they must contribute to the payment of the mortgage according to the value of their several parcels when it was executed; but if the mortgagor retains any part of the premises, that part must first be subjected to the mortgage before resort can be had to the purchasers or to the parts sold. *Morrison v. Beckwith*, 136.
2. **COMPELLING MORTGAGOR TO GIVE SECURITY.**—A mortgagor who sells part of the estate and refuses to pay or secure a balance due on the mortgage may, by the assignee of a note given to him for part of the purchase-price of the lands sold, who had been enjoined from its collection, be compelled to give security on the balance of his estate, for the

- sum remaining due on the mortgage. And when such security is given, the injunction against the collection of the note will be dissolved. *Id.*
3. **SALE OF A SECOND INSTALLMENT** due on a mortgage transfers title free of the lien of a prior installment on the same mortgage. *Parkins v. Campbell*, 188.
 4. **ATTACHING THE EQUITY OF REDEMPTION.**—Where a negotiable note, secured by a mortgage, is transferred without an assignment of a mortgage, the indorsee may attach the equity of redemption, and sell the same under execution in an action against the promisor. *Crane v. Marsh*, 329.
 5. **IN SUCH A CASE** the mortgage still remains in force, the mortgagee being, in equity, the trustee for the holder of the note. *Id.*
 6. **INTEREST OF MORTGAGOR AND OF HIS SECOND AND THIRD MORTGAGEES.**—A mortgagor's interest is subject to sale and transfer, and the interest which his second mortgagee acquires is the right to redeem from the first mortgage; and the interest which the third mortgagee has is to redeem the second mortgage by performing the conditions thereof, and thereby acquire the right to redeem in like manner from the first mortgage, and having performed the conditions of the first and second mortgages, the holder of the third mortgage becomes entitled to the possession of the mortgaged estate as the holder of the three mortgages. *Saunders v. Frost*, 394.
 7. **JOINER OF MORTGAGES IN A BILL TO REDEEM.**—Where F. was first mortgagee, C. was second mortgagee, and C., S., and W. were third mortgagees, and C. assigned to F. the second, and all his interest in the third mortgage, it was held that S. and W. could maintain an action to redeem without joining C. as a party plaintiff, and that they could have done so, even if C. had not assigned, for as to the second mortgage his interest was adverse to theirs. It was also held that redemption could be made from F., by tendering him the amount of the first and second mortgages. *Id.*
 8. **THE RIGHTS OF ASSIGNEE** of a mortgage are not superior to those of his assignor. Hence, where C., S., and W. were joint mortgagees under a third mortgage, and C. assigned to F. a prior mortgage, it was held that F. did not thereby acquire the right to apply the rents and profits of the estate to the payment of the last mortgage, nor to demand from S. and W. the payment of C.'s one third of the third mortgage, as well as the whole of the prior mortgages held by F. *Id.*
 9. **A MORTGAGEE** who has entered for condition broken for non-payment of interest, is not obliged to accept payment of principal not yet due; but the mortgagor has the right to regain possession and protect his estate by paying or tendering the interest due. *Id.*
 10. **POWER OF COURTS IN FORECLOSURE.**—A court of equity has power to make any decree necessary to complete justice between the parties; and execution may be awarded at once or at some future time as equity may require. *Id.*
 11. **IF F., S., AND W. ARE CO-TENANTS OF A JUNIOR MORTGAGE**, and F. owns a prior mortgage in severalty, if S. and W. bring an action to redeem, they must pay the whole of the prior mortgages, and if they do so, they will hold the whole premises, unless F. chooses to reimburse them for his proportion of the money so paid. *Id.*

12. **CONDITIONAL SALE OR MORTGAGE**.—Certain facts as detailed in the statement held to constitute a mortgage. *Johnston v. Gray*, 577.
13. A **RESTRICTION** of the right of redemption to the mortgagor personally is inconsistent with the nature of a mortgage, and void. *Id.*
14. **THE TENDER** of the amount due on a mortgage by the assignee of the mortgagor is good, though he does not state in what capacity he makes the tender. *Id.*
15. **RECORDING** of an assignment of a mortgage need not be alleged in a foreclosure suit by the assignee, since it is merely a matter of evidence. *King v. Harrington*, 675.
16. **RECORDING OF SUCH ASSIGNMENT** is not important as between the assignee and mortgagor, where there is no pretence of payment to the assignor, without notice. *Id.*
17. **BONA FIDE SALE AND DELIVERY OF A NOTE** to the assignee of a mortgage securing the same, passes the title therein without a written assignment of such note. *Id.*
18. **ASSIGNMENT** of mortgagee's interest in the mortgaged premises carries with it the right to receive payment of the notes secured by the mortgage. *Id.*
19. **POSSESSION** of the notes in such case by the assignee is necessary only to rebut the presumption of payment, and not to convey the right. *Id.*
20. **ASSIGNOR** can not receive payment of notes secured by mortgage after an assignment of the mortgage without becoming liable to the assignee for money had and received. *Id.*
21. **WHERE ONE OF TWO MORTGAGEES** has assigned his interest to a third person, and the other mortgagee had deceased after receiving his proportion of the mortgage debt, the assignee may sue alone. *Id.*
22. **REPRESENTATIVES** of the deceased mortgagee are trustees in such a case, holding half the right in trust for the assignee of the survivor, and may be compelled to execute the trust in his favor. *Id.*
23. **DESCRIBING THE DECEASED MORTGAGEE** as A. B., "late of, etc., deceased," is a sufficient averment of his death to enable the assignee of the survivor to sue alone. *Id.*

See **COSTS**, 3; **NEGOTIABLE INSTRUMENTS**, 5.

MUNICIPAL CORPORATIONS.

See **CORPORATIONS**, 7, 8, 9.

NEGOTIABLE INSTRUMENTS.

1. A **NOTE GIVEN** to one of several creditors, in consideration of his having signed a composition deed with the other creditors, whereby the debtor was released from all demands, is, when made without the knowledge of the other creditors, invalid. *Goodwin v. Blake*, 87.
2. **ASSIGNEE OF A NOTE** for the purchase-price of land can not be required, as a condition of its collection, to give bond as security of the title. *Morrison v. Beckwith*, 136.
3. A **SUIT ON NEGOTIABLE PAPER** may be brought on the day it falls due, if demand for payment has first been made at a reasonable hour of that day. *Greeley v. Thurston*, 285.
4. **TIME WHEN SUIT MAY BE BROUGHT**.—Except in the case of negotiable paper, the debtor can not be subjected to an action until after the whole of the day of payment has passed. *Id.*

5. **THE EXECUTION OF A MORTGAGE** by an indorser to the holder, to secure the payment of a promissory note made for the indorser's accommodation, does not extinguish the note. *Clopper v. Union Bank*, 294.
6. **NOTE AS PAYMENT.**—Where an indorser gives his own note to the holder of a promissory note as security for the debt, the original note is not extinguished unless the last note was received in satisfaction of the first. *Id.*
7. **GIVING TIME TO THE INDORSER** of a note drawn and negotiated for the indorser's accommodation, facts known to the holder will not discharge the maker. *Id.*
8. **NOTICE OF NON-ACCEPTANCE** is excused where the drawer has no effects in the hands of the drawee at the time presentment should be made, or having such effects, withdraws them before presentment is made. *Michaelberger v. Findley*, 312.
9. **IN SUCH A CASE** there is no distinction between a non-acceptance and a non-payment, in regard to giving notice. *Id.*
10. **THE DRAWER OF A CHECK** on a bank, where he has no funds, is not entitled to notice of non-payment, nor is he discharged by the failure to present within a reasonable time. *Id.*
11. **DIFFERENCE BETWEEN DRAWING** on an individual and on a bank suggested, where the drawee has no funds of the drawer in his hands. *Id.*
12. **AN INDORSEMENT IN BLANK** before the maturity of a negotiable note, by one to whom the note was not transferred, will create the liability of a grantor upon proof of a legal consideration. *Tenney v. Prince*, 347.
13. **PARTNERSHIP NOTE.**—A promissory note signed by a person, in whose name a copartnership is carried on, does not, although in the hands of an innocent holder, *prima facie* bind his copartners; and the burden of proving that the note was given for the use of the copartnership is upon the holder. *Manufacturers' Bank v. Winship*, 369.
14. **NEGOTIABLE NOTE.**—A negotiable note indorsed when overdue is subject to all equities existing between the maker and payee; and in an action by an indorsee holding a note so transferred the maker may show as a defense a negotiable note of the payee made to him that was intended as payment of the note in suit. *Sargent v. Southgate*, 409.
15. **SET-OFF.**—A negotiable note held by the maker against the payee of a note in suit may be pleaded as a set-off in an action by an indorsee against the maker of the note sued on; provided the note sued on was indorsed after it became due. *Id.*
16. **ESSENTIAL QUALITIES OF A BILL OR NOTE** are: 1. That it be payable at all events, and not contingently or out of a particular fund; and, 2. That it be for the payment of money only, and not for the performance of any other act or in the alternative. *Cook v. Satterlee*, 432.
17. **ORDER PAYABLE ON TAKING UP MAKER'S NOTE.**—An order drawn by A. directing B. to pay C. or bearer a certain sum, "and take up A.'s note for that amount," is payable on a contingency, and is not a bill of exchange even though accepted. *Id.*
18. **WHEN NEW NOTE IS SATISFACTION OF AN OLD ONE.**—A new note given without any new consideration to the same person, and for the same sum as an old one, is not deemed a satisfaction thereof, unless so received and accepted, and whether it was so received and accepted or not, is a question of fact for the jury. *Hart v. Boller*, 556.

19. **THE DEATH OF THE DRAWER** of a promissory note, and issuance of letters of administration to the indorsers and others, before maturity, does not dispense with notice to the indorsers of non-payment. *Junata Bank v. Hale*, 558.
20. **NOTE INDORSED** when long overdue, will be treated as if indorsed on the day of payment for the purpose of demand and notice. *Nash v. Harrington*, 672.
21. **LAW MERCHANT ADOPTED IN VERMONT.**—The law merchant, being a part of the common law of England, has been adopted as such in this state by statute, so far as applicable to our circumstances, and not repugnant to our constitution and laws. *Id.*
22. **INDORSER OF OVERDUE NOTE** is entitled to reasonable demand and notice. *Id.*
23. **WHAT IS REASONABLE DEMAND AND NOTICE** is purely a question of law where the facts are found. *Id.*
24. **WHERE ALL THE PARTIES** live in the same town, in the case of a note indorsed when long overdue, demand should be made upon the maker in a day or two at farthest after the indorsement, and if not paid, notice should be given to the indorser on the day of demand. *Id.*
25. **DEMAND SEVEN DAYS AFTER THE INDORSEMENT**, in such a case, and notice of non-payment given on the first or second day afterwards, are unreasonable and will discharge the indorser. *Id.*
26. **REPUTED OR ACTUAL INSOLVENCY** of the maker does not dispense with the necessity of demand and notice to charge the indorser. *Id.*
27. **NOTE EXECUTED** while the maker is intoxicated so as to be deprived of the exercise of his understanding is voidable by him, although his intoxication was voluntary and not procured by the circumvention of the other party. *Barrett v. Buxton*, 691.
28. **NEGOTIABLE INSTRUMENT, BLANK INDORSEMENT OF.**—An indorsement in blank vests the title to a negotiable instrument in the holder. *Rees v. Conococheague*, 755.

See MORTGAGES, 17, 19.

NEW TRIALS.

1. **REJECTION OF LEGAL AND COMPETENT EVIDENCE** tending to prove a material fact, is a sufficient ground for awarding a new trial, even though the court should deem such evidence insufficient to change the result. *Moon v. Hawks*, 725.
2. **NEW TRIAL** on the ground of newly discovered evidence will not be granted, unless it appear that the evidence was discovered since the trial, and is material, and that no laches is imputable to the party. *Myers v. Brownell*, 729.
3. **CUMULATIVE EVIDENCE** on a controverted point discovered since the trial is not, as a general rule, a ground for a new trial. *Id.*
4. **CUMULATIVE EVIDENCE**, removing all doubt upon a material point, which was before doubtful, and making it apparent that injustice has been done, will warrant the granting of a new trial. *Id.*
5. **APPLICATIONS FOR NEW TRIALS** are addressed to the sound discretion of the court. *Id.*

NOTICE.

1. NOTICE OF UNRECORDED DEED will destroy the legal effect of an attachment levied upon the land as belonging to the grantor. But knowledge of an intent to convey will not produce this result. *Cushing v. Hurd*, 335.
2. THE POSSESSION OF A CESTUI QUE TRUST exercising all the acts of ownership, is not notice of a secret trust to a purchaser. *Scott v. Gallagher*, 508.
3. THE POSSESSION OF A CESTUI QUE TRUST becomes adverse when the legal title is conveyed in violation of the trust. *Id.*
4. NOTICE BY RECITALS IN DEED.—A reference in a deed to a will is notice to the grantee of the trusts contained in the will. *Graff v. Castleman*, 741.

See BONA FIDE PURCHASERS, 5, 6; PARTNERSHIP, 1, 2, 4.

OFFICE AND OFFICERS.

PRESUMPTION THAT OFFICER did his duty will be indulged in to support sales under state revenue laws, until the contrary is shown. *Terry v. Bleight*, 101.

See CORPORATIONS, 11, 12, 13; SHERIFFS.

PARENT AND CHILD.

MAINTENANCE OF CHILD out of his estate will be allowed where he is wealthy, and his father is in indigent circumstances. *Myers v. Myers*, 648.

PARTIES.

See ACTIONS; BONA FIDE PURCHASERS, 2; EXECUTORS AND ADMINISTRATORS, 9.

PARTNERSHIP.

1. NOTICE OF DISSOLUTION of a partnership in the newspapers is sufficient as to all persons who have had no previous dealings with the firm. *Graves v. Merry*, 471.
2. ACTUAL NOTICE of such dissolution is necessary as to all with whom the firm has previously dealt. *Id.*
3. NOTE MADE AFTER DISSOLUTION by one of the partners, in the firm name, to payees, who have had previous dealings with the partnership and have no actual notice of the dissolution, is binding on all the partners. *Id.*
4. INDORSEES HAVING ACTUAL NOTICE of the dissolution may recover on such note against all the partners if it was valid in the hands of the payees, for want of such notice. *Id.*
5. PARTNER'S AUTHORITY AFTER DISSOLUTION to sign the firm name to notes for partnership debts may be implied from circumstances. *Id.*
6. EXPRESS ADMISSION by the other partners that the firm is bound, or a failure on their part to object to such a note as being made without authority, when it is brought to their notice, will warrant a presumption that it was executed with their knowledge and consent. *Id.*
7. WHAT CONSTITUTES A PARTNERSHIP.—If a person is to receive for his services emoluments depending upon the profits and losses of the trade,

he is to be considered a partner; but if he is to receive a certain and definite portion of the profits, he is not a partner. *Simpson v. Feltz*, 602.

8. **LIABILITY OF PARTNER FOR LOSS BY FIRE.**—A partner entitled to receive a share of the profits, must bear his proportion of a loss occasioned by fire. *Id.*

See **CONFLICT OF LAWS**, 1; **NEGOTIABLE INSTRUMENTS**, 13; **SHIPPING**, 2.

PAYMENTS.

1. **CREDITOR CAN NOT APPLY PAYMENTS** to items in his account which he could not recover in an independent action, so as to create a balance in his favor on the remaining items. *Sellick v. Munson*, 689.
2. **ASSIGNMENT AND RECEIPT OF GOODS** to be applied to a particular debt, constitute one entire contract. *Raymond v. Roberts*, 702.
3. **PAROL EVIDENCE** affecting such contract is admissible to prove that there were other goods, not mentioned therein, sold at the same time to be applied upon the same debt, but not to contradict the contract by showing that part of the goods embraced in the assignment were not included in the receipt fixing the price agreed on. *Id.*

PERSONAL PROPERTY.

See **SALES**, 18, 19.

PLEADING AND PRACTICE.

1. **THE ASSIGNMENT OF ERROR.**—That the court erred in denying the motion for a new trial, brings before this court every question which was properly before the lower court on that motion. *McAlexander v. Wright*, 93.
2. **ERROR IN NOT DISMISSING AN ACTION** on application made before the trial, because the attorney had no authority to prosecute it, may be reviewed on motion for a new trial. *Id.*
3. **ERROR IN DISMISSING A CROSS-BILL** can not be reviewed on an appeal from a decree dismissing the original bill. *Terry v. Bleight*, 101.
4. **DISMISSING A BILL** absolutely for want of proper parties, is an error entitling the complainant to a reversal, if he chooses to appeal. *Id.*
5. **IF DEFENDANT DIE AFTER ANSWER**, the suit may be revived against his administrators and minor heirs, by consent, and a guardian *ad litem* need not answer. *Durrett v. Simpson*, 115.
6. **AN ALLEGATION IN A BILL** contradicted by the exhibit referred to is unavailing. *Henderson v. Pickett's Heirs*, 130.
7. **CONTRACT IN WRITING NEED NOT BE ALLEGED.**—In assumpsit for the price of land sold, the complaint need not allege that the contract was in writing. *Kibby v. Chitwood*, 143.
8. **WRIT OF ERROR, WHO MUST JOIN IN.**—Generally a judgment or decree is an entire thing, and therefore all affected by it must join in the writ of error; but if the judgment be several in its nature, a several writ of error lies. A judgment establishing a will is several in its character, and each person affected may severally prosecute his writ of error, or all may join in one writ. *Wells v. Wells*, 150.
9. **CASES DECIDED IN ENGLAND** since 1776 are not authority in the courts of Kentucky, and must not be read therein. *Leigh v. Everheart*, 160.

10. A DEFENDANT CAN NOT BE REQUIRED to answer as to the forgery of a deed which the bill seeks to have canceled as forged. *Id.*
11. PLEADINGS. — Dilatory and declinatory pleas should be made at the proper time, or the same will be deemed waived; but a plea that shows a total want of legal right in a suitor may be objected to and advantage taken of the same at any stage of the proceedings. *Brown v. Saul*, 175.
12. WHERE NO TESTIMONY is offered of a fact, or the proof is so vague and indefinite that the fact to be proved can not be deduced by any rational inference, the court should instruct the jury that it is not competent for them to find such fact. *Riggin v. Patapsco Ins. Co.*, 302.
13. A STATEMENT in a bill of exceptions that certain facts were "proved," construed to mean that evidence was offered to prove them. *Id.*
14. APPELLANT was allowed to dismiss his appeal after the delivery of the opinion, and before judgment. *Newson v. Douglass*, 317.
15. VERDICT subject to the opinion of the court upon facts stated authorizes the court to draw the same conclusions from such facts as the jury would have been entitled to draw. *Jackson v. Whitbeck*, 454.
16. RECORD showing a continuance to October term, with an award of venire to December term, and then stating "at which day came the parties, etc., and the jurors," etc., must be understood to mean that the parties and jurors appeared at December term. *Miller v. Plumb*, 456.
17. MISCONTINUANCE IS CURED by the statute of jeofails. *Id.*
18. SETTING ASIDE A JUDGMENT entered upon a verdict, without setting aside the verdict, is error. *Huston v. Mitchell*, 506.
19. WHERE THERE IS NO CONFLICT of testimony, a statement of its legal effect by the court is not considered as taking the facts from the jury. *Johnston v. Gray*, 577.
20. AN ANSWER TO THE MERITS does not deprive the defendant of any legal objection insisted on in the answer. *Teague v. Dendy*, 643.
21. TO A BILL FOR AN ACCOUNT, an administrator whose letters had been revoked, may show that he had fully settled with his executor. *Id.*
22. EXCEPTIONS.—A party has a right to require the opinion of the court upon any point of law pertinent to the issue, and a refusal to give it will be error to which an exception may be taken. *Fletcher v. Howard*, 686.
23. JUDGE CERTIFYING EXCEPTIONS is not bound to notice points decided to which no exceptions were taken and noted at the time, but he may do so. *Steele v. Bates*, 720.
24. VARIANCE IN DATE, WHEN IMMATERIAL.—An allegation that an action was commenced on the twenty-fourth is supported by proof of a writ dated the twenty-fifth, for the day is not material. *Id.*
25. PLEADINGS—CORPORATIONS.—An allegation that plaintiff is a corporation is unnecessary. *Rees v. Conococheague Bank*, 755.

See BONDS, 9.

PLEDGES.

1. DELIVERY OF POSSESSION must accompany a pledge of a personal chattel to render it valid. *Fletcher v. Howard*, 686.
2. IF THE PAWNER immediately redelivers the thing pledged to the pawnor the special property therein created by the bailment is determined. *Id.*

3. **GENERAL OWNER** having possession of a pledge may lawfully dispose of it to any one, and the pawnee can not recover it or maintain trespass for it. *Id.*

POWERS.

1. **REVOCATION**.—A naked power or authority may be revoked at pleasure. A power or authority coupled with an interest is irrevocable. *Mansfield v. Mansfield*, 76.
2. A **POWER COUPLED WITH AN INTEREST** exists when the person to whom the power is given derives a present or future interest in the subject over which the power is to be exercised. The interest must be in the thing itself, and not in the execution of the power merely. *Id.*
3. A **POWER TO SELL AND CONVEY** is a naked power and is revocable. *Id.*
4. **SURVIVAL OF POWER**.—A power coupled with an interest, as where it is given to secure a debt, may be executed, notwithstanding the death of the principal. *Id.*
5. A **POWER UNDER A WILL TO SELL** such property of a testator as may be useless to his estate does not authorize an executor to sell whatever property he pleases. *McCants v. Bee*, 610.

PROCESS.

1. **PARTY DECOYED** from another state or country, on a promise not to sue him, may, upon being sued in violation of the promise, avoid the process, and may also bring an action for his damages by the breach of such promise. *Steele v. Bates*, 720.
2. **IF SUCH PARTY** do not avoid the process on the ground of the fraud, but proceed to trial upon the merits, and judgment go against him, he can not recover the amount of that judgment as damages for the breach of such promise. *Id.*
3. **JUDGMENT** against a party decoyed within the jurisdiction of the court for the purpose of service, is conclusive until reversed or set aside. *Id.*

See **ARREST**.

QUO WARRANTO.

INFORMATION in the nature of a *quo warranto* lies in all cases where a charter exists, and a question arises concerning the exercise of an office claimed under that charter; but the court has the right to grant or refuse it, according to the circumstances. *Commonwealth v. Arrison*, 531.

REAL ESTATE.

A **REMAINDER-MAN** can not obtain security of the tenant for life where there is no danger of the latter's insolvency, nor any reason to fear his departure or disposal of the property. *Smith v. Daniel*, 641.

See **BOUNDARIES; GRANTS; NOTICE**, 2, 3.

RECORDING.

1. **THE RECORD OF A DEED** takes effect from the time it is filed for record, and not from the time it is in fact copied into the recorder's book. *Breckenridge v. Todd*, 83.

2. A PRIOR DEED enrolled within the time allowed by law takes precedence over a subsequent deed first enrolled, both under the statute of this state and that of England. *Id.*

See MORTGAGES, 15, 16; NOTICE, 1.

RELATION.

See TRESPASS, 1.

RELIGIOUS SOCIETIES.

See CONTRACTS, 6, 7; CORPORATIONS, 1, 3, 16.

REMAINDERS AND REVERSIONS.

See REAL ESTATE.

REPLEVIN.

THE GENERAL ISSUE in replevin admits the right of property to be in the plaintiff. *Harper v. Baker*, 112.

RES ADJUDICATA.

MISTAKE IN A FORMER DECREE is not conclusive upon the same parties in a subsequent action where the point to which the mistake referred was not in litigation between the parties in the prior cause. *Garrett v. Day*, 629.

See DIVORCE, 1; DOWER, 1; ESTOPPEL, 1, 2; JUDGMENTS, 6, 11, 18.

RESCISSION OF CONTRACTS.

See CONTRACTS, 1, 2, 3; EVIDENCE, 2.

SALES.

1. GOODS SOLD ON CONDITION that security for the purchase-price given do not pass absolutely to the vendee, where such security is not given, although the goods were removed by the vendee without objection. *Whitwell v. Vincent*, 355.
2. IN SUCH CASE, if the vendee sell the goods and take a negotiable note, which he transfers to a creditor having full knowledge of the facts, an action of assumpsit will not lie by the original vendor against the creditor, the note being unpaid, as such a form of action is an affirmation of the sale. *Id.*
3. DELIVERY OF GOODS to a purchaser on a fair contract, without any fraudulent contrivance to obtain possession, passes the property, and the vendor can not maintain trover for such goods in case of non-payment of the purchase-money. *Chapman v. Lathrop*, 433.
4. WHERE ONE SELLS GOODS to be paid for in cash, no time of payment being specified, payment and delivery are simultaneous acts, and the vendor may refuse to part with the goods until payment. *Id.*
5. DELIVERY WITHOUT PAYMENT in such a case passes the property, and the vendee may avail himself of any legal set-off, notwithstanding his agreement to pay ready money. *Id.*
6. VENDOR MAY STOP GOODS *in transitu*, before actual delivery, on the vendee's becoming bankrupt. *Id.*

7. **ABSOLUTE DELIVERY OF GOODS** sold is a waiver of antecedent conditions. *Id.*
8. **VENDEE OFFERING PAYMENT** in notes of the vendor, after delivery of the goods, where he has promised to pay cash, is not guilty of fraud if he did not contemplate payment in such notes at the time of the purchase or delivery. *Id.*
9. **DELIVERY OF CHATTELS.**—Where a purchaser of chattels takes possession of part of them, and the key to the shop containing the residue is left with a third person for him by the vendor pursuant to an understanding between them, the property thereby passes so as to enable such purchaser to maintain trespass against a subsequent purchaser from the vendor who takes actual possession of the goods in the shop by borrowing the key from the person with whom it is left. *Chappel v. Marvin*, 684.
10. **PROPERTY IN PERSONAL CHATTELS** may pass by a bargain and sale for sufficient consideration without delivery as between the parties, but delivery is necessary as to other persons. *Fletcher v. Howard*, 686.
11. **WHEN THE SAME CHATTEL** is sold to two purchasers by conveyances equally valid, he who first lawfully acquires possession must prevail. *Id.*
12. **CONSIDERATION, SUFFICIENCY OF.**—The liability of the purchaser of a chattel as surety on the vendor's note, or the discharge of a debt due from the vendor to the purchaser, is a sufficient consideration for the sale of such chattel. *Id.*
13. **TEMPORARY DELIVERY OF POSSESSION** of a chattel to a purchaser who, after retaining it for a few hours, redelivers it or permits it to return to the possession of the vendor does not pass the property as against a second purchaser from the vendor who subsequently takes possession. *Id.*
14. **CONTINUED CHANGE OF POSSESSION** is necessary to transfer the title as against a subsequent purchaser for value. *Id.*
15. **MERE POSSESSION OF A CHATTEL** with the owner's consent, and without any fraudulent or deceptive purpose will not render such chattel liable to the debts or disposition of the possessor. *Moon v. Hawks*, 725.
16. **IF THE POSSESSION IS FRAUDULENT** or intended to give the possessor a false credit, of which the jury are to judge, the property may be taken for such possessor's debts. *Id.*
17. **SALE OR GIFT** may be inferred from circumstances, where there is no proof of an actual sale. *Id.*
18. **POSSESSION ALONE** is presumptive evidence of ownership of a chattel, and if not opposed is sufficient; and the evidence is still stronger if the possession is accompanied by the exercise of complete acts of ownership for a length of time. *Id.*
19. **SELLING PART** of a number of chattels received at the same time and under the same circumstances, is proper evidence to go to the jury upon the question of ownership of the residue. *Id.*

See **FRAUDULENT CONVEYANCES**, 2, 4.

SEALS.

See **CORPORATIONS**, 6.

SEDUCTION.

1. **DAMAGES FOR SEDUCTION.**—The wounded honor of the family and the laceration of the parental feelings may be regarded in estimating damages. When the father of the seduced female is the plaintiff, no acts of service need be proved if she be a minor; but if she be of age, it must appear that she resided in her father's family, and some acts of service, however slight, must be proved. *Emery v. Gowen*, 233.
2. **SEDUCTION.**—A father may sustain an action for the seduction of his minor daughter, though she reside, when debauched, out of his family, unless he has divested himself of his right to control her and to require her services. *Id.*
3. **SEDUCTION OF A FEMALE APPRENTICE**, while she is a minor and after her master turns her away, or after, with the consent of the master, her return to reside with her father, gives the latter a cause of action against the seducer. *Id.*

SET-OFF.

See SALES, 5; VENDOR AND VENDEE, 14.

SHERIFFS.

1. **THE SHERIFF MAY DEMAND AN INDEMNITY** where there is such a claim to the property, adverse to the defendant in the execution, as would reasonably raise a doubt or apprehension as to the title, or create a pause in the mind of a constant man. *Spangler v. Commonwealth*, 548.
2. **THE SHERIFF IS THE AGENT OF THE PLAINTIFF** for certain purposes only; being made such by the law and not by his appointment, the plaintiff is bound only by those acts that are strictly within the scope of his authority. *Sims v. Campbell*, 595.
3. **THE AUTHORITY** of the sheriff extends only to the making of the money due; he can not, therefore, prejudice the rights of the plaintiff by any contract or compromise. *Id.*
4. **OFFICIAL ACTS** performed in the sheriff's office are presumed to be done by his authority; but this presumption may be rebutted by proof that they were done without authority or by mistake. *Id.*

See ACTIONS.

SHIPPING.

1. **OWNER OF VESSEL, WHEN NOT LIABLE.**—If a vessel is let to the master, on the shares, he victualing, manning her and paying a part of the port charges, and having absolute control of her, but yielding as compensation for the use a part of the net earnings, the liability of the general owners ceases. The master in such a case is the owner *pro hac vice*. *Thompson v. Snow*, 263.
2. **PARTNERSHIP, WHAT IS NOT.**—If the owners of a vessel let her to the master, accepting as their compensation for her use a certain portion of the net profits, this does not create a partnership. *Id.*
3. **USAGE, COMMON CARRIER.**—Where by the usage of the place goods shipped on freight are consigned to the master for sales and returns, the owners of the vessel are liable for the payment of the proceeds to the shippers. *Emery v. Hervey*, 268.

4. AN OWNER PRO HAC VICE of a vessel is one who has the entire control and direction thereof, so that the general owner, for the time being, has no right to interfere in its management. *Id.*
5. A BILL OF LADING UNINDORSED and sent to one in a letter, containing no words of transfer, it being for the delivery of goods to "A. or his assigns," will not support an action by the holder, either as assignee or surviving owner. And the delivery of a part of the cargo will not estop the owner of a vessel from denying the plaintiff's title to the residue. *Stone v. Swift*, 349.
6. LAWFUL CONTRACTS OF A MASTER of a general ship, relative to the usual employment of the vessel, are binding upon the owners. *Ward v. Green*, 437.
7. THE MASTER is the confidential agent of the owners at large, intrusted with the conduct and management of the ship. *Id.*
8. A GENERAL SHIP is one in which the master or owners engage separately with a number of persons unconnected with each other, to convey their respective goods to the place of the ship's destination. *Id.*
9. MASTER OF A GENERAL SHIP ABROAD has power to make contracts in relation to freight which will be binding on the owners. *Id.*
10. OWNER ON BOARD exclusively attending to the shipment of the cargo, is not bound by the master's contracts, but to exempt himself from liability he must show that he was exclusively attending to that business. *Id.*
11. OWNERS ARE LIABLE for goods stolen on the voyage which were shipped on a contract with the master, without their knowledge, and which were not put on the freight list, although one of the owners was on board as supercargo, but not shown to have been exclusively attending to the shipment of the cargo. *Id.*
12. FREIGHT PRO RATA ITINERIS is due where a ship is disabled by perils of the sea from pursuing its voyage, without the master's fault, and puts into an intermediate port, and the owner there receives his goods. *Welch v. Hicks*, 443.
13. ACCEPTANCE OF GOODS must be voluntary to give a right to *pro rata* freight. *Id.*
14. MASTER'S REFUSAL TO REPAIR his ship, or to procure others and send on the goods, entitles the owner to receive the goods at the intermediate port without paying freight *pro rata*. *Id.*
15. WHERE MASTER AT FIRST REFUSED TO REPAIR the ship and proceed with the voyage, or to procure other vessels and forward the goods, but afterwards consented to repair and proceed, under circumstances calculated to excite doubts of his sincerity, and the owner then received his goods, it is for the jury to decide whether the offer to repair was *bona fide*, and the acceptance was voluntary, so as to entitle the ship to *pro rata* freight. *Id.*

SIGNATURE.

NAME.—JUNIOR is no part of a man's name, and need not be affixed to the name or signature of a person, although he is the younger of the persons bearing the same name. *Johnson v. Ellison*, 163.

SPECIFIC PERFORMANCE.

1. OF VOLUNTARY CONTRACT.—If a parent, in consideration of love and

affection, make a deed to his family, which is inoperative for want of delivery in his life-time, equity will aid the grantees, and secure them the legal title. *Jones v. Jones*, 35.

2. **SPECIFIC PERFORMANCE OF AN AWARD**, made pursuant to a voluntary submission of the parties in writing, may be decreed, although there may have been no acquiescence in the award, or part performance of it. *Jones v. Boston Mill Corp.*, 358.
3. **AN AWARD DIRECTING THE EXECUTION OF RELEASES** may be specifically performed in equity. *Id.*

See **BONA FIDE PURCHASERS**, 1, 2, 3, 4.

STATUTES.

1. **AN INTENTION TO REPEAL EXISTING LAWS** is not presumed. *Saul v. His Creditors*, 212.
2. **SUBSEQUENT STATUTES DO NOT ABROGATE** former ones by containing different provisions on the same subject; they must be contrary to produce such an effect. *Id.*
3. **A REAL STATUTE** is one which regulates property within the state where it is in force. *Id.*
4. **THE REAL STATUTE** of the situation prevails over the personal statute of the domicile. *Id.*
5. **A PERSONAL STATUTE** is one which follows and governs the party subject to it wherever he goes. *Id.*
6. **DEFINITIONS OF REAL AND PERSONAL STATUTES** quoted and considered. *Id.*
7. **A STATUTE GOVERNING** the property rights of husband and wife is not a personal statute; but is a real statute. *Id.*
8. **RETROSPECTIVE STATUTES.**—A statute limiting the time to five years to recover real estate sold by an administrator applies only to sales made subsequent to the passage of the statute, and has no retrospective operation. *Holyoke v. Haskins*, 372.
9. **STATUTE DECLARING A THING VOID** is often to be construed as making it merely voidable at the instance of a party. *Allen v. Huntington*, 702.

STATUTE OF LIMITATIONS.

1. **LIMITATIONS.**—Ignorance of one's rights, when not owing to the fraud or default of the debtor, does not prevent the operation of the statute of limitations. *Jordan v. Jordan*, 249.
2. **WHEN THE STATUTE OF LIMITATIONS** once begins to run, no subsequent disability will stop its operation. *Ruff v. Bull*, 290.
3. **THE STATUTE DOES NOT ATTACH** unless there is some person in being competent to sue. *Id.*
4. **VOID ACTS ACQUIRE NO VALIDITY BY THE LAPSE OF TIME.**—So held as to a grant of administration originally void for want of jurisdiction. *Holyoke v. Haskins*, 372.

See **CONSTITUTIONAL LAW**, 4.

STOPPAGE IN TRANSITU.

See **SALES**, 6.

SUCCESSION.

A BASTARD'S MOTHER does not inherit his estate. *Cooley v. Dewey*, 325.

SURETYSHIP.

1. DISCHARGE OF SURETY.—A request made by the widow of a surety five months after the latter's death, to the obligee of a bond, to sue the principal, will not discharge the administrator of such surety. *Gardner v. Ferree*, 513.
2. THE SURETY, or, after his death, his personal representative alone, can request the obligee to sue the principal; and the obligee may treat the request of the widow as that of a mere stranger. *Id.*
3. EXTENT OF OBLIGEE'S DUTY.—The obligee is bound to do no more than permit the surety to manage the legal responsibilities of the parties, so as to cast the burden where it ought to be borne; and if, when requested to sue, he offers the bond to be sued on, the surety who refuses such offer will not be discharged. *Id.*
4. THE PARTY WHO RECEIVES THE BENEFIT from the contract, and makes the payments and all arrangements in reference to it, is the principal. *Smith v. Tunno*, 617.
5. SUBROGATION OF SURETY TO RIGHTS OF OBLIGEE.—A surety has a right to be subrogated to all the securities which the obligee has. *Id.*
6. RELEASE OF SURETY.—If the obligee releases any of his securities, or enters into a new contract with the principal, by which the terms of the original contract are varied, without the knowledge or consent of the surety, he will be discharged from his liability. *Id.*
7. MERE FORBEARANCE TO SUE or to demand payment will not discharge the surety in a bond. *Id.*
8. SURETIES, on discharging the obligation, are entitled to the securities given by their principal. *Lowndes v. Chisolm*, 667.

See BONDS, 2, 5, 6, 10; EXECUTORS AND ADMINISTRATORS, 6; GUARDIAN AND WARD, 6.

TENANTS IN COMMON.

ACTUAL OUSTER by tenant in common may be presumed from his exclusive possession of the premises under claim of title for forty years, without any assertion of right or claim to any share in the profits on the part of his co-tenants, and an ejectment by them will be barred. *Jackson v. Whitbeck*, 454.

TAXATION.

1. STATUTE EXEMPTING from taxation lands, tenements, and other estates, extends to money at interest. *Atwater v. Woodbridge*, 46.
2. EXEMPTION, WHEN A CONTRACT.—A statute exempting from taxation the property which should be thereafter given for the support of the ministry of the gospel, is in the nature of a contract, which the state can not rescind or impair. *Id.*
3. TO MAINTAIN A TAX SALE all the requisites of the law must be shown to have been complied with. *Terry v. Bleight*, 101.
4. ASSESSMENT MAY BE VALID IN PART.—An assessment of a tax is valid, and is not vitiated as to those that are liable although certain persons are assessed who are not liable to be taxed. *Inglee v. Bosworth*, 419.

5. **ASSESSORS LIABLE FOR PROPERTY TAKEN FOR ILLEGAL TAX.**—Assessors are liable for taking property to pay a tax illegally assessed. *Id.*

TENDER.

1. A CREDITOR can not be required to accept a part of a debt which has not become due. *Saunders v. Frost*, 394.
2. A TENDER of principal and interest, when only the latter was due, is good, unless the creditor shows a willingness to accept the amount due. *Id.*
3. TENDER must precede suit where the plaintiff relies on an equitable title under a contract for conveyance. *Chahoon v. Hollenback*, 587.
4. TENDER OF MONEY due the beneficiary should be made to the trustee. *Id.*

See MORTGAGES, 14.

TERRE-TENANTS.

See JUDGMENTS, 12, 13, 14.

TORTS.

See CORPORATIONS, 18, 19.

TRESPASS.

1. **TRESPASSER BY RELATION.**—One who receives possession of property known to him to have been wrongfully taken from another, does not thereby become a party to the wrong, and can not be held liable as a trespasser by relation. *Harper v. Baker*, 112.
2. **AGREEING TO A TRESPASS** committed for one's use makes him guilty of trespass, and liable as a trespasser. *Id.*

See CORPORATIONS, 19, 20, 23; EXECUTIONS, 7, 14, 15.

TROVER.

1. **CONVERSION, EVIDENCE OF.**—Where a vendee takes possession and lets the premises, together with the use of chattels thereon belonging to the vendor, and receives pay for such use, there is sufficient evidence of a conversion. *Miller v. Plumb*, 456.
2. **DAMAGES** in trover are not severable where an entire sum is recovered for the conversion of articles for some of which trover will not lie, but the judgment must be reversed. *Id.*

See COMMON CARRIERS, 2, 3, 4.

TRUSTS AND TRUSTEES.

1. A TRUSTEE, MORTGAGEE, TENANT FOR LIFE, OR PURCHASER, who gets an advantage by being in possession, and purchases an outstanding title or incumbrance, can not use it for his own benefit, but must be considered as holding it in trust for him under whose title he entered. A court of equity will, however, lend its aid to secure or reimburse all advances properly made by a trustee or agent to fortify the title. *Morgan v. Boone*, 153.
2. **WHEN LEGATEE BECOMES A TRUSTEE.**—A legatee who takes an estate subject to a trust takes it as a trustee. *McCants v. Bee*, 610.
3. A TRUSTEE can not purchase for himself, nor deal with the *cestui quetrust*, in reference to the trust estate. *Id.*

4. PURCHASES BY A TRUSTEE from his *cestui que trust* will not be sustained by courts of equity unless, after the most rigorous scrutiny, it clearly appears that there is no fraud or concealment in the transaction, and no advantage taken by the trustee of information obtained by him in that capacity. *Id.*
5. THE COMPENSATION OF A TRUSTEE should be put at the lowest estimate where the transactions of the trust are involved in obscurity, which might have been removed by a proper attention to duty. *McDowell v. Caldwell*, 635.
6. THE TENANT FOR LIFE is a trustee for those in remainder. *Smith v. Daniel*, 641.
7. A PURCHASER from a trustee, with knowledge of the trust, takes subject to the trust. *Id.*
8. THE TRUST MAY BE ENFORCED against a purchaser without knowledge thereof, where he still retains the property in his hands. But it is otherwise where he has parted with the property. *Id.*
9. A TRUSTEE will be remunerated for necessary improvements rendering permanent benefit to the estate of the beneficiary. *Myers v. Myers*, 648.
10. A TRUSTEE MAY NOT EMPLOY THE TRUST FUND for his own benefit. Principle applied to the case of an executor who had mixed the assets of the estate with his own property, and had invested them. *Id.*
11. A TRUSTEE'S REFUSING TO ACCOUNT furnishes a good reason for adopting against him the most rigid rule of calculation. *Id.*
12. TRUST FUND—APPROPRIATION OF.—An executor or trustee has no right to apply to his own use the trust fund; and a purchaser, knowing of the trust, purchases at his peril the trust property so applied. *Graf v. Castleman*, 741.

See BONA FIDE PURCHASERS, 6; NOTICE, 2, 3.

USAGE.

See FACTORS.

VENDOR AND VENDEE.

1. WASTE AFTER CONTRACT OR SALE, where possession is to be delivered at a future day, must be borne by the vendor if committed by his tenants. In such a case he must tender compensation before he can require the vendee to perform his part of the contract. *Durrett v. Simpson*, 115.
2. A PAROL GRANT of a branch line from a principal line of water pipes from a fountain, creates a tenancy at will only. It does not disable the grantor from executing a prior contract of sale. *Id.*
3. VIOLATION OF CONTRACT OF SALE.—A contract to sell the privilege of water in the state in which it then was, is violated by a subsequent sale of a branch line from the principal line of water pipes. *Id.*
4. RIGHT TO ENTER AND REPAIR or to insert new pipes is not secured by a stipulation in a conveyance to the effect that the pipes conveying water through the lot are to remain undisturbed by the grantee. *Id.*
5. PURCHASER RESTRICTED TO HIS COVENANTS.—One who accepts a conveyance with covenants for title, upon which he has an adequate remedy at law, can not enjoin the assignee of a note for part of the purchase-price, because of an incumbrance, without asking a rescission. The rule is other-

wise if the grantor has become insolvent; but if he were insolvent at the time of the sale, and the purchaser knew this, and relied upon covenants running with the land and contained in prior conveyances, he is not entitled to any injunction. *Morrison v. Beckwith*, 126.

6. **VENDEE'S REMEDY ON BREACH OF CONTRACT** to convey, on payment of the purchase-money, where payment has been duly made, is by action on the contract, and he can not rescind the contract and sue for the purchase-money and interest. *Fuller v. Hubbard*, 424.
7. **VENDEE MUST DEMAND** a conveyance in such a case, after paying or tendering the purchase-money, and must attend to receive it, after waiting a reasonable time for it to be made out. *Id.*
8. **ENGLISH RULE** is, it seems, that the vendee must prepare the conveyance and tender it for execution. *Id.*
9. **AGREEMENT TO CONVEY** in fee-simple is satisfied by a conveyance without covenants. Hence, the existence of a judgment against the vendor will not, at law, authorize the vendee to rescind the contract. *Id.*
10. **A JUDGMENT AGAINST THE VENDOR**, after the execution of articles of agreement but before the execution of a deed, binds the legal estate of the vendor. And the purchaser at the sheriff's sale would be entitled to the unpaid purchase-money, and could enforce that right in an action of ejectment against the terre-tenant. *McMullen v. Wenner*, 543.
11. **IT IS A FRAUD** on the part of the vendor to conceal the fact that part of the land contracted for belongs to a third person. *Cook v. Grant*, 564.
12. **A COVENANT OF WARRANTY** in a deed by such third person is not an execution of the contract of the vendor to convey with warranty. *Id.*
13. **THE VENDOR CAN NOT COMPEL** the vendee to accept a conveyance of the land by such third person after considerable delay where the property had greatly depreciated. *Id.*
14. **SET-OFF OF ANY INCUMBRANCES DISCHARGED**, may be made by the vendee of a tract of land in an action for the consideration-money; but he is still liable for the balance. *Tod v. Gallagher*, 571.

See **CONTRACTS**, 1, 2, 3; **FIXTURES**, 3.

VERDICT.

1. **ALTERING A VERDICT** on a certificate of a mistake in rendering it, is not permissible after the verdict has been received and recorded, and the jury have been dismissed. *Walters v. Junkins*, 585.
2. **SUCH IMPROPER ALTERATION** is the subject of a writ of error. *Id.*

See **PLEADING AND PRACTICE**, 15.

VOLUNTARY CONVEYANCES.

See **FRAUDULENT CONVEYANCES**, 1.

WAGERS.

MONEY BET on an election which is paid over by the stake-holder to the winner, contrary to the orders of the loser, after the result of the election is known, may be recovered back. *McAllister v. Hoffman*, 556.

WARRANTY.

See **INSURANCE, FIRE**, 1; **INSURANCE, MARINE**, 14, 15.

WATER-COURSES.

1. **THE PROPRIETORS OF THE BANKS** of unnavigable streams have property in the bed to the middle. *Ingraham v. Wilkinson*, 342.
2. **ISLANDS IN AN UNNAVIGABLE RIVER**, if altogether on one side of the dividing line, belong to him who owns the bank on that side; if formed in the middle of the river they are appropriated to the owners of the bank in severalty according to their original dividing line, the *filum aquæ*, as it is where the waters begin to divide. *Id.*
3. **NAVIGABLE RIVERS**.—Rivers are considered navigable as far as the tide ebbs and flows, and not navigable above that point. *Commonwealth v. Chapin*, 386.
4. **RIGHT OF FISHERY** in a navigable river is common to all, subject to governmental regulations. *Id.*
5. **RIPARIAN OWNERS**.—The proprietor of the adjoining soil has the exclusive right of fishery in front of his land to the thread of the stream, in a river not navigable, subject to legislative regulations; but this right does not carry with it the right to prevent the passage of fish to the lakes and ponds, for increase of the species. *Id.*
6. **INDICTABLE OFFENSE AT COMMON LAW**.—Obstructing the passage of fish by a dam built across a river not navigable, was not indictable at the common law, but recourse must be had to the statutory remedy. *Id.*
7. **PUBLIC EASEMENT**.—The public have an easement for passing boats in rivers which are, in fact, navigable above the ebb and flow of the tide. *Id.*
8. **GRANT BOUNDED ON NON-NAVIGABLE STREAM**.—A grant of land by the state bounded, in terms, on the margin of a stream above tide-water, extends to the thread of the stream, unless there is an express reservation of the property in the stream. *Ex parte Jennings*, 447.
9. **GRANT BOUNDED ON NAVIGABLE RIVER** extends only to high-water mark. *Id.*
10. **NAVIGABLE RIVER**, in a legal sense, is one in which the tide ebbs and flows. *Id.*
11. **EASEMENT IN STREAMS ABOVE TIDE-WATER**.—In streams above the ebb and flow of the tide, which are in fact capable of navigation, the public has an easement or right of passage, as in a highway, and the right of the riparian owner is subject to this easement. *Id.*
12. **COMMON LAW RULE AS TO WATER-RIGHTS** is that each owner of land through which a stream of water flows, is entitled to have it flow in its natural course, and may have an action for any diversion of it to his injury. *Martin v. Bigelow*, 696.
13. **THERE MUST BE A PREVIOUS APPROPRIATION** of the water to some use by such land-owner before he can be said to sustain any damage. *Id.*
14. **COMMON LAW RULE** is modified in Vermont as being inapplicable to our circumstances. *Id.*
15. **PRIOR OCCUPANCY** of water of a stream by an owner of land through which it flows, as by erecting a mill thereon, does not, in this state, give the proprietor a right to prevent a land-owner above on the same stream from using the water in a prudent way without wanton waste as it flows down its natural channel, even though he be somewhat damnified thereby, if such prior occupancy has not continued for fifteen years. *Id.*

See EMINENT DOMAIN, 3, 4.

7

WAYS.

See EASEMENTS, 3.

WILLS.

1. PAROL EVIDENCE is not admissible to show the intention of a testator in making his will, and thereby to obtain a construction of the will, not warranted by its express terms. *Avery v. Chappel*, 53.
2. MISTAKES IN WILLS.—Equity can not, on parol proofs, relieve against a mistake in a will, by reforming the will so as to conform it to the instructions alleged to have been given by the testator to the scrivener. *Id.*
3. A WILL CAN NOT BE ENLARGED OR VARIED by parol evidence, except to explain a latent ambiguity arising *dehors* the will, or to rebut a resulting trust. *Id.*
4. DEVISES VOID IN LAW because made to a corporation not capable of holding lands, or because of a fatal misnomer, have been sustained and aided in equity. *Greene v. Dennis*, 58.
5. DEVISE TO THE YEARLY MEETING OF QUAKERS, and to their successors, is void, because the association is not a corporation, and the members are not so designated as to take as individuals. *Id.*
6. IN CASE OF A LAPSED DEVISE, the lands do not vest in the residuary devisee, but descend to the heir. *Id.*
7. PROCEEDINGS ESTABLISHING OR ANNULING WILLS are *in rem*, and bind the whole world. All persons interested may become parties and present proofs, either for or against the establishment or annulment of the will. *Wells v. Wells*, 150.
8. WILLS MAY BE PRESENTED for admission to probate, by either an executor, legatee or devisee. *Id.*
9. REPUBLICATION OF A WILL is not essential where the testator erases the name of one of the executors and inserts another in its place. *Id.*
10. REVOCATION OF A WILL, so as to require a republication, does not result from the striking out of a devise, or of the name of an executor. *Id.*
11. WILL, PUBLICATION OF.—If the due subscribing and attesting of a will be proved, it need not be shown that the testator made the usual declaration that it was his last will and testament. *Small v. Small*, 253.
12. WILL, UNDUE INFLUENCE.—The influence which a wife, by her virtues, gains over her husband's affections and conduct, whereby he is caused to make a will in her favor, is no ground for refusing to admit the will to probate. *Id.*
13. JURISDICTION.—The construction of a will is purely a matter of common law jurisdiction; while the question whether it ought to be approved and allowed is one of purely probate jurisdiction. *Id.*
14. ATTESTATION OF WILL.—It is not essential that a testator should actually see the witnesses attest his will; but it is necessary that he should be in a situation to do so if he desire it. *Edelen v. Hardey's Lessee*, 292.
15. ATTESTATION OF A WILL in a room adjoining that wherein the testator lay, and between which there was a plank partition, is *prima facie* evidence of the illegality of the instrument, although such attestation was at the testator's request, and was subsequently approved by him. *Id.*

16. **RESIDUARY DEVISE.**—A residuary devise of "all his estate, whether real or personal," will pass a mortgage held by the testator at the time of making his will; and a foreclosure of the mortgage or a release of the equity of redemption will revoke such a devise. *Ballard v. Carter*, 377.
17. **WILL — WHAT PASSES BY.** — Real estate acquired subsequent to the execution of the will is not affected thereby; so held where the testator at the time of the execution of his will held a mortgage and subsequently acquired the fee to the land and canceled the mortgage. *Id.*
18. **IN CONSTRUING WILLS**, the intention must govern. The intention must be collected from all parts of the will taken together, and not from particular parts or expressions. *Myers v. Myers*, 648.
19. **PERSONS BORN AFTER THE DEATH OF TESTATOR** can not take under a legacy to a class, unless there is a fixed period for the distribution. Where the period is indefinite, only those *in esse* at the testator's death can take. *Id.*
20. **IDEM.**—Nor will a future definite time for distribution be inferred from directions regarding the falling in of an inconsiderable life-estate of a legatee; nor will the arrival of the legatee at the age of twenty-one years be considered the period for distribution simply from the provision in the will relative to his education. *Id.*
21. **A DEVISE OF "ALL MY LANDED ESTATE,"** followed by a description of several tracts of land, will not pass a lot described. *Id.*

See POWERS, 5.

WITNESSES.

See EVIDENCE, 3, 9, 12.

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